113-537

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 159.

JOEL B. EARHARDT, APPELLANT,

vs.

ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING AND AUGUST KRILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED NOVEMBER 14, 1881.

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1 Pleas in the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Plaintiff,
vs.
ANTHONY BOARO *et al.*
In Chancery.

Transcript.

2 Pleas in the Circuit Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered that heretofore, and on, to wit, the 9th day of April, A. D. 1881, came Joel B. Erhardt, by Messrs. M. B. Carpenter, J. M. Sample, and Wells, Smith & Macon, his solicitors, and filed in said court his bill of complaint, and sued out of said court a writ of subpœna against Anthony Boaro, William L. Hull, Eugene B. Cushing, ——— Hollabaugh, and August Krille.

The said bill of complaint being in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Colorado, } *ss:*

In the Circuit Court of the United States for the District of Colorado.

To the judges of the circuit court of the United States for the district of Colorado:

Joel B. Erhardt, of the city of New York, and the State of New York, and a citizen of the State of New York, brings this
3 his bill of complaint, against Anthony Boaro, W. L. Hull, whose first name is to plaintiff unknown, Eugene B. Cushing, ——— Hollabaugh, whose first name is to plaintiff unknown, all of the county of Dolores, in the State of Colorado, and August Krille, of the county of Las Animas, in the same State, all of whom are, and each of whom, is, a citizen of the State of Colorado. And thereupon your orator complains and says, that heretofore, and on or about the — day of ——, A. D. 1880, your orator being then a natural born citizen of the United States, and one Thomas Carroll, a naturalized citizen of the United States, then and still a citizen of the said State of Colorado, entered into a certain contract, whereby it was agreed that in consideration of certain provisions and mining supplies to be by your orator furnished, the said Thomas Carroll was to explore and search in the public domain of the United States, within the said Pioneer Mining District, for lodes, veins, and deposits of gold and silver-bearing ore, and that in all such lodes and depositesso by the said Thomas Carroll discovered, four undivided fifths should be located in the name of your orator, and one undi-
4 vided fifth in the name of the said Thomas Carroll.

And your orator further shows that on information and belief that afterwards, and on or about the 17th day of June, A. D. 1880, the said Thomas Carroll, while exploring in the public domain

of the United States, in pursuance of his agreement with your orator, and while the said agreement was still in force, discovered in the said Pioneer Mining District, in the county of Dolores, then in the county of Ouray, and State of Colorado, upon the divide between Horse Gulch and the West Dolores river, and about four and one-half miles northwesterly from the town of Rico, in the said county of Dolores, then the county of Ouray, upon vacant and unoccupied lands in the public domain of the United States, a lode or vein of rock in place bearing gold and silver; and at the point of the discovery of said lode, on the day of the discovery thereof, commenced to sink a discovery shaft upon the vein of said lode, and sunk the same to the depth of two feet or thereabouts; and on that same day, and at the place of the discovery of said lode posted upon the surface a plain sign or notice, containing the name of the
5 said lode, by which the same was by said Carroll then and there designated, to wit, the Hawk lode, and the date of the discovery thereof, to wit, the 17th day of June A. D. 1880, aforesaid, and the names of your orator and said Carroll as the discoverers thereof, and setting forth also that your orator and the said Thomas Carroll claimed upon the said lode fifteen hundred feet in length.

That your orator and the said Thomas Carroll then and always afterwards fully intended, in good faith, within 60 days from the discovery of the lode, to complete the said discovery shaft upon the said vein to the depth of ten feet and more from the lowest part of the rim of such shaft at the surface, and to a well defined crevice, and to locate and take upon the said lode a mining claim of 1,500 feet in length, and to mark the bounds of the said claim by six substantial posts, hewed and marked on the side in towards their said claim, and sunk in the ground, one at each corner of said claim, and one at the centre of each side line, and also to record their said claim in the office of the recorder of the said county of Ouray, within the limits of which, as the same then were, the said lode was
6 situate, by a location certificate setting forth the name of the said lode, and the name of your orator and the said Thomas Carroll as the locators thereof and the date of the location of the said claim, and the number of feet in length claimed by them on each side of the centre of the said discovery shaft, and the general course of the said lode, as nearly as the same could be known, with a description of their said mining claim sufficient to identify the same.

And your orator and the said Carroll would have completed said discovery shaft to the depth aforesaid in all things as required by law; but your orator shows, on information and belief, that on or about the 30th day of June, A. D. 1880, and while your orator and said Carroll were temporarily absent from the said claim, and within 60 days and less from the date of the said discovery of the said lode, the defendants, Anthony Boaro and W. L. Hull, well knowing the premises, entered upon the said lode and into the discovery shaft which the said Thomas Carroll, for himself and your orator, had commenced to sink thereon, and pulled up and carried away and concealed the stake and notice which the said Carroll had

7 erected thereat, and falsely pretending that they, or one of them, had discovered the said lode, and that the notice so by the said Thomas Carroll erected at the point of his said discovery was invalid and ineffectual, solely by reason that the same failed to set forth the course of said lode, and pretending that they, or one of them, had located upon the said lode at the same place at which the same was by the said Carroll discovered, as aforesaid, a mining claim, by them called the Johnny Bull lode, began to claim the said lode for the length of 1,500 feet along the vein thereof, 600 feet running north, and 900 feet running south from the centre of the discovery shaft so commenced by the said Carroll, with surface ground 300 feet in width, 150 feet on each side of the centre of the said lode, and began to work and mine therein, and to sink at the same place at which the said Carroll had commenced to sink, and excavate the discovery shaft aforesaid, a certain shaft by them called the discovery shaft of the said so-called Johnny Bull lode, and within sixty days of the discovery of said lode by the said Carroll, as hereinbefore set forth, the said Boaro and Hull did sink and complete upon the vein of said lode, at the same place aforesaid, a dis-
8 covery shaft ten feet more in depth at the lowest part of the rim of said shaft, and to a well-defined crevice of rock in place bearing gold and silver.

Your orator further shows that immediately upon entering into possession of the said lode, as above set forth, the said Boaro and Hull, with others, their confederates, to your orator unknown, began to give out in speeches that your orator and said Carroll could not, nor should, enter into or upon the said lode, or the premises by them claimed as the Johnny Bull lode, as aforesaid, and that they, the said defendants, and their confederates aforesaid, or some of them, would shoot any person who should or might attempt to enter into or upon the said premises. That thereafter, until the lapse of sixty days and more from the date of the discovery of said lode by said Carroll, said Boaro and Hull were in exclusive possession of said lode and the discovery shaft so commenced by said Carroll therein, and by means of such unlawful occupation and possession of the said lode and the discovery shaft so commenced therein by the said Thomas Carroll, and by such threats of violence as above set forth, the said
9 Anthony Boaro and W. L. Hull prevented your orator and said Carroll from completing their said discovery shaft within sixty days from the day of the discovery of said lode by said Thomas Carroll.

Your orator further shows that, on or about the eighth day of September, A. D. 1880, and within ninety days from the day of the discovery of the said vein or lode by said Carroll, your orator and the said Thomas Carroll located their mining claim upon the said lode, to wit, 1,500 feet in length, 600 feet running north from the centre of the discovery shaft by them commenced as aforesaid, and by the said Anthony Boaro and W. L. Hull completed as aforesaid, and 900 feet running south from the centre of said discovery shaft, and with surface ground 300 feet in width, 150 feet on each side of the center of said vein, and marked the bounds of their said claim and

location by six substantial posts or stakes, marked on the inside towards the said claim, and set in the ground, one at each corner of their said claim, and one at the center of each side line thereof. And on or about the 14th day of September, A. D. 1880, and within ninety days from the discovery of said lode by the said Thomas Carroll, your orator and the said Carroll caused to be filed in the office of the
10 recorder of the said county of Ouray, a certain certificate of the location of their said mining claim, by them called the Hawk lode as aforesaid, setting forth therein the name of the said lode, to wit, the Hawk lode; the name of the locators thereof, to wit, your orator and the said Thomas Carroll; and the date of the location of their said claim, to wit, the 17th day of June, A. D. 1880, and the number of feet claimed on each side of the center of said discovery shaft thereon, to wit, 600 feet north from the center of said discovery shaft, and 900 feet south from the center thereof, together with the general course of the lode, and a description thereof sufficient to identify the same with reasonable certainty, and which said description, as set forth in said certificate, was and is in words and figures as follows, to wit:

Beginning a corner No. 1, a well-marked post, being the northeast corner of said claim, whence bear S. P. 6 in. diam. S. 2° E. 3 ft. dist., Elliott Mt. N. 67° 25′ E., and Monument Peak N. 42° 35′ E.; thence west 300′ ft. to .N. W. cor. No. 2; thence south 750 ft. to W. side center post, and 1,500 ft. to S. W. cor. No. 3; whence bear from peak N. 37° E., and S. P. 15 in. diam. N. 72° W. 20 ft. dis-
11 tant; thence east 300 ft. to S. E. cor. No. 4; whence bears S. P. 15 in. diam. S. 55° E. 5 ft. dist.; thence north 750 ft. to E. side center post, and 1,500 feet to N. E. cor. No. 1 the place of beginning; said claim is situate on the divide between Horse Gulch and West Dolores, about 4,5 miles N.W. of Rico discovery a 10 ft. face, whence bears Expectation Mountain S. 39° 5′ E., surveyed September 8th, 1880; va., 14° 30′ E.

And your orator further shows that at the date of the filing of the said location certificate, and for a long time before that, the said Horse Gulch and the West Dolores river in the said certificate mentioned, and said Rico, and the said Expectation Mountain were by the names aforesaid well known to all the miners of the said Pioneer Mining District, and the said county of Ouray.

Your orator further shows that well knowing the premises, the said Anthony Boaro and W. L. Hull, after the filing of the said certificate of location, not regarding the rights of your orator and the said Thomas Carroll in the premises, still maintained possession of the said premises and of your orator's discovery shaft therein, (and until on or about the — day of September, A. D. 1880, and until after the lapse of 60 days or more from the discovery of said Hawk lode, by said Thomas Carroll,) of the whole of the said Hawk lode, within the limits of the said location of your orator and said
12 Thomas Carroll, and repeatedly afterwards threatened your orator and the said Thomas Carroll with death in case they should attempt to resume possession of their said location, or begin to work or mine therein.

And, on information and belief, your orator shows that on or about the said — day of September, A. D. 1880, the said Boaro and Hull began to claim the said Hawk lode within the following described bounds: Beginning at corner No. 1, being the northeast corner of said Hawk lode, thence west along the north end line of said lode 300 ft. to corner No. 2 thereof; thence south along the west side line of said lode 1,132.2 feet; thence N. 10° 11′ east to the east side line of said Hawk lode, and thence north along said east side line to the place of beginning, under and by the name of the Johnny Bull lode aforesaid, and still claim and hold possession thereof within the limits aforesaid, including therein the discovery shaft so commenced by the said Thomas Carroll.

Your orator further shows, on information and belief, that on or about the 26th day of October, 1880, the said Boaro and Hull released and conveyed some interest in the said so-called Johnny
13 Bull lode unto the defendant, August Krille, and the said other defendants now have, or claim to have, some right, share, or interest in the said so-called Johnny Bull lode.

But your orator shows that on or about the — day of ——, 1880, and from thence for a period of three weeks, and before the said defendants, or either of them, had done any work in or upon the said premises, save as aforesaid, your orator caused to be published in the Dolores News, a weekly public newspaper, published in the town of Rico aforesaid, a notice, in substance declaring and setting forth the rights of your orator and said Carroll in and to the said Hawk lode, and the wrongful claim thereunto of the said Anthony Boaro and W. L. Hull, under and by the name of the Johnny Bull lode, and warning the said Boaro and Hull not to prosecute further work upon the said premises. And your orator, about that same time, served notice in writing to the same effect, personally, on the said defendants, Hull, Boaro, and Krille.

And your orator shows, on information and belief, that whatever interest the said defendants, or either of them, have acquired in or to the said so-called Johnny Bull lode was acquired in bad
14 faith, and with full notice of the rights of your orator and the said Thomas Carroll in the premises.

Your orator further shows, on information and belief, that the said defendants, not regarding the rights of your orator in the said premises, by virtue of the location hereinbefore mentioned, now are, and for a long time past have been, forcibly occupying and withholding from your orator possession of the said Hawk Lode, within the limits and bounds aforesaid, and every part thereof, and maintaining the possession thereof by means of a large force of armed men, and working and mining therein a reckless, unskillful, and unminer-like manner, solely with the intent to extract therefrom the gold and silver-bearing ores of said mine, and that said defendants threaten to, and, as your orator is informed and believes, will, continue such unlawful and forcible possession of said premises, and such improper mining and waste therein, unless restrained by the writ of injunction hereafter prayed. Your orator further shows, on information and belief, the said lode abounds in an ore bearing

great quantities of gold and silver; that the vein of said lode is open, soft, and easily worked, and that the said defendants,
15 if permitted to continue working and mining in and upon the said premises until the final determination of the action at law, instituted by your orator as hereinafter mentioned, and, as your orator believes, will extract and carry away from said premises many thousands of dollars in value of the said ore.

Your orator further shows, on information and belief, that the said defendants have already extracted from the said premises and claim of your orator one hundred and fifty tons, or thereabouts, of the said ore, of the value of $25,000 or thereabouts, as your orator is informed and believes; one hundred tons whereof, or thereabouts, now remain in possession of the defendants at the said premises. That the acts of the said defendants, hereinbefore set forth, tend to the destruction of the substance of your orator's said estate, and that the injury to your orator is and will be irremediable at law. That your orator hath lately instituted in this honorable court a certain action at law against the defendants, to recover possession of his said before-described mining claim, and the said action is now therein pending and undetermined.

16 To the end, therefore, that the said Anthony Boaro, W. L. Hull, Eugene B. Cushing, August Krille, —— Hollabaugh may answer this your orator's bill of complaint, (but not on oath, their oaths, and the oaths of each of them, to their respective answers being hereby expressly waived), and may show, if they can, why your orator should not have the relief hereby prayed, that the writ of injunction may issue out of this court, under the seal thereof, strictly restraining and enjoining the said defendants, their agents, servants, tenants, and all claiming under them, or either of them, from committing further waste in the said Hawk lode, hereinbefore described, or any part thereof, or mining therein or within the bounds thereof, or extracting any ore or rock therefrom, until the final determination of your orator's said action at law, and from removing, carrying away, concealing, selling, or disposing of any of the ore which by them heretofore hath been, or at any time before the service of the said writ of injunction shall be, mined or extracted from the said lode, and from preventing your orator, his attorneys, solicitors, counsel, agents, or servants from visiting and inspecting the said premises, and the bounds thereof, and the shafts,
17 drifts, and other workings therein, during the pendency of the said action at law; that at the final hearing of this cause the said injunction be made perpetual, or that your orator may have such further relief, or such other and different relief, as to your honors may seem meet and according to equity.

May it please your honors to grant to your orator, not only the writ of injunction aforesaid, but also the most gracious writ of subpœna, issuing out of this court and under the seal thereof, directed to the said Anthony Boaro, W. L. Hull, Eugene B. Cushing, August Krille, and —— Hollabaugh, commanding them and each of them, on a certain day therein named, and under a certain penalty, to be and appear in this honorable court, then and there to answer the

premises, and abide [by] and perform such order or decree as may be made against them.

JOEL B. ERHARDT.

M. B. CARPENTER,
J. M. SAMPLE,
WELLS, SMITH & MACON,
Plaintiff's Sol'rs, & of Counsel.

18 UNITED STATES OF AMERICA, } ss:
State and District of Colorado, }

On this 2nd day of April, A. D. 1881, before the undersigned a notary public in and for county of Arapahoe, State of Colorado, personally appeared Joel B. Erhardt, and made oath that he has heard read the above bill subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

In witness whereof I have set my hand and official seal the day and year aforesaid.

[L. S.] PERRY AUSTIN,
Notary Public.

19 And afterwards, and upon the aforesaid 9th day of April, A. D. 1881, a subpœna in chancery was issued, in words and fingres following to wit:

The United States of America.

UNITED STATES OF AMERICA, } ss:
District of Colorado. }

The President of the United States of America to Anthony Boaro, W. L. Hall, Eugene B. Cushing, August Krille, and —— Hollenbaugh, Greeting:

You and every of you are hereby commanded that you appear before the judges of the circuit court of the United States of America, for the district of Colorado, at the city of Denver in said district, on the first Monday in May next, (it being the 2nd day of May, A. D. 1881,) to answer the bill of complaint of Joel B. Erhardt, this day filed in the office of the clerk of said court, in said city of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the marshal of the district of Colorado to execute and make due return.

20 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of the said circuit court for the district of Colorado, at the city of Denver aforesaid, this ninth day of April, in the year of our Lord one thousand eight hundred eighty-one, and of the Independance of the United States the 105th year.

[L. S.] EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Memorandum.

The above-named defendants are hereby notified that unless they and each of the shall enter their appearance in the office of the clerk of *of* said court, at the city of Denver aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

EDWARD F. BISHOP, *Clerk.*
By F. W. TUPPER, *Deputy Clerk.*

Upon the foregoing writ appears the marshal's return in words and figures following, to wit:

DISTRICT OF COLORADO, *ss:*

RICO, COLORADO, *Apr. 30th*, 1881.

In obedience to the instructions of complainant's solicitors, I hereby return the within writ, not found as to all the defendants.

P. P. WILCOX, *Marshal.*
By ISAAC YAHO,
Deputy Marshal.

21 And afterwards, *to wit*, on, to wit, the 15th day of April, A. D. 1881, came again the said complainant by his solicitors aforesaid, and files in said court and in said cause his precipe for, and sued out of said court a second subpœna.

The aforesaid precipe being in words and figures following, to wit:

DENVER, *Apr.* 15, 1881.

ED. F. BISHOP, Esq, *Clerk:*

Please issue a subpœna in Erhardt, *vs.* Krille *et al.*, to be sent to Las Animas county.

Truly, &c., WELLS, SMITH & MACON.

And upon the aforesaid 15th day of April, A. D. 1881, a second subpœna was issued, in words and figures following, to wit:

The United States of America.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

The President of the United States of America to Anthony Boaro, W. L. Hull, Eugen B. Cushing, August Krille, and —— Hollabaugh, Greeting:

You and every of you are hereby commanded that you appear before the judges of the circuit court of the United States of America for the district of Colorado, at the city of Denver in said district,
22 on the first Monday in June next, (it being the 6th day of June, A. D. 1881), to answer the bill of complaint of Joel B. Erhardt, this day filed in the office of the clerk of said court, in the city of Denver, then and there to receive and abide by such judg-

ment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the marshal of the district of Colorado to execute and make return.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of the said circuit court for the district of Colorado, at the city of Denver aforesaid, this fifteen- day of April, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 105th year.

[L. S.] EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Dep'ty Clerk*.

Memorandum.

The above-named defendants are hereby notified that unless they, and each of them, shall enter their appearance in the office of the clerk of said court, at the city of Denver aforesaid, on or be-
23 fore the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Dep'ty Clerk*.

Marshal's Return.

DISTRICT OF COLORADO, *ss*:

RICO, COLO., *May* 23, *A. D.* 1881.

I have duly executed the within writ by personally delivering a certified copy of the within to Anthony Boaro and —— Hollabaugh, May 11th, 1881, W. L. Hall, May 12th, 1881, and Eugene B. Cushing, May 23d, 1881. All served in Dolores county, State and district of Colorado, on dates above mentioned. As to August Krille, not found.

P. P. WILCOX, *Marshal*,
By ISAAC YAHO, *Deputy Marshal*.

Marshal's fees: Service, 4 persons, $8.00.

24 And afterwards and on, to wit, the 24th day of May, A. D. 1881, came again the said complainant, by his solicitors aforesaid, and filed in said court, and in said cause, his motion for a temporary injunction, and the affidavits of Thomas Carroll, Wm. H. Bennett, Frank W. Gove, Donald McIntyre, John J. Colman, A. Frank Carroll, Ellis B. Edwards, Allin Binns, Patrick Cain, L. C. Grant, & Worden Grigsby, & Charles A. Jones, in support of said motion.

The aforesaid motion [is] in words and figures following, to wit:

In the Circuit Court of the United States for the District of Colorado.
In Equity.

JOEL B. ERHARDT
vs.
ANTHONY BOARO *et al.*

At this day come the said plaintiff and moves the court here to award a temporary injunction according to the prayer of the bill of complaint filed herein, and for cause of this motion the said plaintiff shows to the court here the matters set forth in said bill and
25 in the affidavits of L. C. Grant, Chas. A. Jones, Patrick Cain, William H. Bennett, Frank W. Gove, A. Frank Carll, Allen Binns, John J. Cohlman, Donald McIntyre, Worden Gregsby, Thomas Carroll, & Ellis B. Edwards.

M. B. CARPENTER,
WELLS, SMITH & MASON,
Pl'ff Sol's & of Counsel.

The affidavit of Thomas Carroll being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado.
In Chancery.

JOEL B. ERHARDT, Complainant,
vs.
ANTHONY BOARO *et als.*, Defendants.

Thomas Carroll, being duly sworn, on his oath deposes and says: That he is a citizen of the United States of America, and a resident of the town of Rico, in the county of Dolores, in the State of Colorado.
That on the 17th day of June, 1880, affiant was, and for
26 some time prior thereto had been, under contract with one Joel B. Erhardt to search, explore, and prospect for valuable deposits of mineral upon the public domain of the United States within Pioneer mining district, in said county of Dolores, in the State of Colorado, whereby, in consideration of certain wages and supplies to be paid and furnished by said Erhardt to affiant, on discoveries affiant might make of valuable mineral deposits as aforesaid, should be located an undivided four-fifths' interest therein in the name of said Erhardt, and an undivided one-fifth interest in the name of affiant.

That in pursuance of said contract with said Erhardt, affiant, prior to the said 17th day of June, 1880, had entered upon the said public domain within said Pioneer Mining District to search for valuable mineral deposits, and on the day last aforesaid, to wit, June 17th, 1880, while prospecting as aforesaid on what is known as the Divide, between West Dolores and the east fork of Horse creek, about four and half miles northwest from said town of Rico, the same being then a part of the public domain and vacant, unoccu-

pied mineral lands of the United States, affiant discovered
27 and disclosed at a point on said divide a valuable vein, lode, or deposit of rock in place bearing gold and silver in large and paying quantities, which said discovery was prior to the pretended discovery of one Anthony Boaro, as hereinafter mentioned.

And affiant further deposes and says that then and there, on the said day of his discovery, and at the point thereof, he posted on the surface a plain sign or notice, containing the name of said lode, the date of his discovery, and the names of the claimants by right and in virtue of said discovery, which said notice was substantially as follows, to wit:

"*Hawk Lode.*

"Discovered June 17th, 1880.

"We, the undersigned, claim 1,500 feet on this mineral-bearing lode or deposit.

"J. B. ERHARDT.
"THOMAS CARROLL."

And affiant further says that said claim to said vein, lode, or deposit was made in good faith and with the purpose of complying with all and singular the laws, rules, and regulations pertaining to the location of mining claims, and that at no time did either himself or the said Erhardt, as he believes, after the date of his
28 said discovery and posting of notice, abandon or contemplate the abandonment of their said claim, or any interest therein, or part thereof, or their firm purpose of perfecting their location thereof.

And affiant further says that the point on said divide at which he made his said discovery of mineral as aforesaid, and at which he posted said notice, is near the crest of what, among miners, is known and designated as a *hog back*, extending north and south along said divide.

That the point at which he discovered and disclosed mineral as aforesaid was the only point within a radius of fifteen hundred feet at which mineral could then be found, or at which said vein or deposit could then be discovered.

That from the lay and geological appearance of the country he supposed, and it was then most probable, that the said vein extended in its course along said hog back in a south and north direction, and affiant then expected that after completing his location assessment on said vein or deposit, he would locate his claim along said hog back.

29 But within a short while after affiant's said discovery, to wit, on the 30th day of June, 1880, one Anthony Boaro, prospecting in said vicinity, came upon the stake upon which affiant had posted his said discovery notice, and under the claim and pretence that the claim of affiant and said Erhardt was void by reason of affiant's failure to designate the course and direction of the vein upon which he claimed, he, with the purpose and intent of defrauding affiant and said Erhardt of their lawful and just rights in

that behalf, took possession of affiants discovery, digging thereon away the stake upon which was posted affiant's said notice, and at the point of affiant's said discovery erected a stake and posted thereon a notice, claiming said vein or deposit, by the name of the Johnny Bull lode, and falsely and fraudulently claiming to be the discoverer thereof, claiming fifteen hundred feet in length on said vein by three hundred feet in width, locating his pretended claim in a north and south direction along said hog-back, which was, as already stated, the then probable course of the said vein or deposit.

30 Affiant further says that in pursuance of the said purpose of defrauding affiant and said Erhardt, the said Boaro and W. L. Hull, whom he, Boaro had associated with himself, on the 30th day of June, 1880, in the temporary absense of affiant and said Erhardt, took actual and exclusive possession of affiant's discovery digging and of the said premises, and have ever since wrongfully and unlawfully held and retained possession of the same to the exclusion of affiant and said Erhardt, and within a very short while, long before the expiration of the period of sixty days from the date of affiant's said discovery, completed and performed in said vein disclosed by affiant, and at the said point of his discovery, a full and complete location assessment.

And affiant further says that immediately after his said unlawful taking posession of the said premises, the said Boaro begun to give out in speeches that he would kill the said Carroll or any one else who should attempt to work the said Hawk claim, and thus affiant and said Erhardt were wrongfully prevented from performing and completing their said discovery working.

And affiant further says that on the 8th day of September, A. D. 1880, the said Erhardt and himself caused F. W. Gove, a United States
31 deputy surveyor, to survey their said claim on said vein or deposit, claiming six hundred feet north and nine hundred feet south from affiant's said discovery digging and along the course of said hog back by one hundred and fifty feet on each side of the center of said vein; and caused the surface boundaries of their said claim to be marked by six substantial posts, hewed and marked on the sides in towards their said claim, and sunk one at each of the four corners thereof and one at the center of each side line thereof, which survey and marking of boundaries the said Gove was, by reason of the threats of said Boaro, compelled to do secretly and without the knowledge of said Boaro.

And affiant further deposes and says that before the expiration of the period of three months from the date of his said discovery he and said Erhardt recorded their claim in the office of the recorders of deeds of Ouray county, in which county the premises were then situated, by filing therein a certificate of location containing the name of their said lode, the names of the locators thereof, the date of their location, the number of feet in length claimed on
32 each side of the center of their discovery shaft, and the general course of said lode as near as might be, and such a description of their said claim, with reference to natural objects and permanent landmarks, as would suffice to identify said claim with

reasonable certainty, as will more fully and particularly appear from said location certificate, a duly certified copy of which is hereto attached and made a part hereof.

And further affiant saith not. THOMAS CARROLL.

Subscribed and sworn to before me, this 9th day of May, 1881.

[L. S.] L. V. RUSSER,

Judge & ex officio Clerk County Court, Dolores County, Colorado.

The said location certificate above referred to as being attached and made part of the foregoing affidavit of Thomas Carroll being in words and figures following, to wit:

STATE OF COLORADO, }
County of Ouray, } *ss:*

Know all men by these presents, that we, J. B. Erhardt (½ int.) and Thos. Carroll (½ int.), the undersigned, have this 17th day of June, 1880, located and claimed, and by these presents do
33 locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws, and regulations, 1,500 linear feet and horizontal measurement, on the Hawk lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles, and variation, as allowed by law, together with 150 feet running east and 150 feet running west from the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim, 600 feet running north from center of discovery shaft and 900 feet running south from center of discovery shaft, said discovery shaft being situate upon said lode, vein, ledge, or deposit and within the lines of said claim, in Pioneer Mining District, County of Ouray and State of Colorado, described by metes and bounds, as follows, to wit:

Beginning at corner No. 1, a well marked post, being the N. E. cor. of said claim; whence bear S. P. 6 in. diam., S. 2° E., 3 feet dist., Elliot Mt. N. 67° 25′ E., and Monument Peak, N. 42° 35′ E.; thence west 300 feet to N. W. cor. No. 2; thence south 750 feet to west side center post, and 1,500 ft. to S. W. cor. No. 3; whence bear
34 from Peak N. 37° E., and S. P. 15 in. diam, N. 72° W. 20 ft. dist.; thence east 300 ft. to S. E. cor. No. 4; whence bears S. P. 15 in. diam., S. 55° S., 5 ft. dist.; thence north 750 ft. to E. side center post, and 1,500 ft. to N. E. cor. No. 1, the place of beginning; said claim is situate on the divide between Horse Gulch and West Dolores, about 4.5 miles N. W. of Rico. Discovery a 10 ft. face; whence bears Expectation mountain S. 39° 5′ E.; surveyed September 8th, 1880; Va. 14° 30′ E.

J. B. ERHARDT. [SEAL.]
THOS. CARROLL. [SEAL.]

Said lode was located on the 17th day of June, A. D. 1880.

Attest: FRANK W. GOVE,
Surveyor.

Date of certificate, Sept. 8th, A. D. 1880.

STATE OF COLORADO, } ss:
County of Ouray, }

I, C. W. Haskins, county clerk and recorder in and for the said county, in the State aforesaid, do hereby certify the above and foregoing to be a true and correct copy of the location certificate of the Hawk lodge, as appears upon the records of my office.

Given under my hand and official seal, this 11th day of Dec., A. D. 1880.

C. W. HASKINS,
Clerk and Recorder.

35 The affidavit of William H. Bennetts, above referred to, being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for District of Colorado.
In Chancery.

JOEL B. ERHARDT, Complainant
vs.
ANTHONY BOARO, *et als.*, Defendants.

William H. Bennetts being first duly sworn, on his oath deposes and says: That he is a citizen of the State of Colorado, and a resident of the town of Rico, in the county of Dolores, in said State, and for several months last past has been employed as foreman of the mines owned and worked by the Grand View Mining Company, and the Rico Mining Company, in Pioneer Mining District, in the county and State aforesaid; that he is a miner by trade, and has many years' practical experience as such, and has held at Rico and elsewhere in the State of Colorado, many positions of trust and responsibility as captain and foreman of extensive and valuable mines.

36 Affiant further says that he is personally acquainted with one Anthony Boaro and one W. L. Hull, both residents of said town of Rico, who claim to be the owners by virtue of a discovery and location as they claim of certain premises lying and being situated in said Pioneer Mining District, in the county and State aforesaid, and claimed by them as the Johnie Bull Lode mining claim or deposit.

Affiant further says that he is also personally acquainted with one Thomas Carroll, a resident of said town of Rico, who, together with one Joel B. Erhardt, claim to be the owner of a great portion of said premises under and by virtue of a location thereof by the name of the Hawk lode, made by said Carroll and Erhardt pursuant to and in virtue of a discovery of mineral in said premises, when the same were vacant and unoccupied mineral lands of the United States, of

America, and long prior to any discovery or location of the same or any part thereof by said Boaro or Hull, and in full compliance, as claimed by said Carroll and Erhardt, with all rules, customs, regulations, and laws appertaining to the location of mining claims.

37 Affiant further says that on a certain day toward the latter part of the month of August or early in the month of September last past, at a certain cabin about a mile from the said town of Rico, known as Max's place, the said Boaro, in conversation with affiant and one Donald McIntyre and one J. Frank Carroll, respecting the validity of the said Johnnie Bull lode, mining claim, or deposit, stated and admitted that prior to any discovery of mineral in said premises by him, the said Boaro, or by said Hull, or any location thereof by them or either of them, the said Carroll had entered upon the said premises and had discovered a mineral-bearing vein or deposit therein, and at the said point of his discovery had erected a stake with a written notice thereon containing a statement of the name of the lode he had discovered, the date of his discovery, and the names of himself and Erhardt as the discovers and locators thereof, and also a claim of fifteen hundred feet along the course of the vein. And the said Boaro then and there further stated and admitted that after the said discovery and staking by said Carroll,

38 and before the expiration of the period of sixty days from the date thereof, he, the said Boaro, had entered upon the said premises, saw the said stake erected by said Carroll as aforesaid and threw it away, and at the point of said Carroll's discovery, and within said period of sixty days, erected the discovery stake of the said Johnnie Bull lode claim and did a full assessment work: and said Boaro then and there in said conversation stated as the ground and reason of his location of said premises as aforesaid, the fact that the said notice on said Carroll's stake failed to state the course and direction of the vein upon which he claimed. And said Boaro claimed that by virtue of said defect in said Carroll's notice, and of the fact that he, said Boaro, and Hull had worked an assessment at said point of discovery before Carroll had done so, the Johnnie Bull claim was good and valid, and that he would shoot any son of a bitch who should attempt to interfere with said claim.

Affiant further says he has visited the workings in the said Johnnie Bull claim, and that at the point where the discovery work was done there is plainly visible within a few inches from the surface a large body of mineral-bearing rock.

39 W. H. BENNETTS.

Subscribed and sworn to before me, this 7th day of May, 1881.

[L. S.] L. V. RUSSER,
Judge & ex-officio Clerk County Court, Dolores County, Colorado.

The affidavit of Frank W. Gove, above referred to, being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado. In Chancery.

JOEL B. ERHARDT, Complainant,
vs.
ANTHONY BOARO *et als.*, Defendants.

Frank W. Gove, being duly sworn, on his oath deposes and says, that he is a United States deputy mineral surveyor, appointed by the United States surveyor general of the State of Colorado, and is a resident of the town of Rico, in the county of Dolores, in said State of Colorado.

Affiant further says that on the 8th day of September, A. D. 1880, he surveyed the *the* claim of Thomas Carroll & Joel B. Erhardt, consisting of fifteen hundred feet in length and three hundred feet in width on the Hawk lode, situated on the divide between West Dolores and the east fork of Horse creek, about four and a half miles northwest from the town of Rico, in Pioneer Mining District, in the county and State aforesaid, and marked the boundaries thereof by six substantial posts, hewed and marked on the sides in toward the said claim, and sunk in the ground, to wit: One at each of the four corners of said claim, and one at the center of each of the side lines thereof. Affiant further says that on the sixteenth day of August, 1880, he surveyed the claim of Anthony Boaro and W. L. Hull, consisting of fifteen hundred feet in length by three hundred feet in width on the Johnny Bull lode, being the same premises embraced with the boundaries of the said Hawk lode claim, and that there was then on said lode a complete discovery, working, or location assessment, whence Expectation Mountain bears south 39° 5′ east.

Affiant further deposes and says that by reason of threats of violence made by said Boaro he was compelled to survey the said Hawk claim and direct the boundaries stakes thereof clandestinely, and without the knowledge of said Boaro, and that he did so survey the said Hawk claim and erect the said boundaries stakes thereof without the knowledge of said Boaro on the day when he surveyed the said Johnnie Bull claim for an amended location certificate.

And further affiant saith not.

FRANK W. GOVE.

Subscribed and sworn to before me, this 13th day of May, A. D. 1881.

[L. S.] L. V. ROSSER,
Judge and ex-officio Clerk County Court, Dolores County, Colorado.

And the affidavit of Donald McIntyre, above referred to, being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado.
In Chancery.

42 JOEL B. ERHARDT, Complainant,
vs.
ANTHONY BOARO *et als.*, Defendants.

Donald McIntyre, first being duly sworn, on his oath deposes and says: That he is a citizen of the State of Colorado, and a resident of the town of Rico, in the county of Dolores, in said State.

Affiant further says that he is personally acquainted with one Anthony Boaro and one W. L. Hull, both residents of said town of Rico, who claim to be the owners, by virtue of a discovery and location, as they claim, of certain mining premises, lying and being situated in Pioneer Mining District, in the county and State aforesaid, and claimed by them as the Johnnie Bull lode, mining claim, or deposit.

Affiant further says that he is personally acquainted with one Thomas Carroll, a resident of said town of Rico, and one Joel B. Erhardt, of the city of New York, who claim to be the owners of a great portion of the said premises, under and by virtue of a location thereof, by the name of the Hawk lode, made by said Carroll and
Erhardt, pursuant to and in virtue of a discovery of mineral
43 on said premises, when the same were vacant unoccupied mineral lands of the United States of America, and long prior to any discovery or location of the same, or any part thereof, by said Boaro or Hull, and in full compliance, as claimed by them, the said Carroll and Erhardt, with all rules, customs, and laws pertaining to the location of mining claims.

Affiant further says that on a certain Sunday, toward the latter part of the month, or early in the month of September last, at a certain cabin in Horse Gulch, known as Max's place, about one mile from the said town of Rico, the said Boaro, in conversation with affiant, one A. Frank Carll, and one William Bennetts, respecting the validity of the said Johnnie Bull lode claim, stated and admitted that prior to any discovery of mineral on said premises by himself or said Hull, or any location thereof by either of them, the said Carroll had discovered a mineral-bearing vein or deposit thereon, and at the point of his discovery erected a stake with a written notice thereon containing a statement of the name of the lode he
had discovered, the date of his discovery, and the names of
44 himself and Erhardt, as the locators thereof, and also a claim of fifteen hundred feet along the course of the vein; and said Boaro then and there further stated that after the discovery and staking by said Carroll as aforesaid, and before the expiration of sixty days from the date thereof, he, the said Boaro, had thrown said stake away, and at the point of said Carroll's discovery, then and there he erected the discovery stake of the said Johnnie Bull claim and completed a full location assessment. And Boaro stated then and there in said conversation, as the ground and reason of the

location by him of said premises as aforesaid, the fact that the notice in said Carroll's stake failed to state the course and direction of the vein upon which he claimed, and that by virtue of the said defect in said Carroll's notice, he, Boaro, claimed that the Johnnie Bull location was valid, and that he would shoot any son of a bitch who should attempt to interefere with his said claim.

And further affiant saith not.

DONALD McINTYRE.

Subscribed and sworn to before me, this 7th day of May, 1881.

[L. S.] L. V. RUSSER,

Judge & ex-officio Clerk of County Court, Dolores County, Colorado.

45 And the affidavit of the said John J. Colunan, above referred to, being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado.

In Chancery.

JOEL B. ERHARDT, Complainant,

vs.

ANTHONY BOARO *et als.*, Defendants.

John J. Colunan, being first duly sworn, on his oath deposes and says: That he is a citizen of the State of Colorado, and a resident of the town of Rico, in the county of Dolores, in said State, and that he is a prospector by trade.

Affiant further says he is personally acquainted with one Anthony Boaro and one W. L. Hull, who claim to be the owners, by virtue of a discovery and location, as they claim, of certain premises lying and being situate in Pioneer Mining District, in the county and State aforesaid, and claimed by them as the Johnnie Bull lode mining claim, or deposit.

46 Affiant further says that he is also personally acquainted with one Thomas Carroll and one Joel B. Erhardt, who claim to be the owners of a great portion of the said premises under and by virtue of a location thereof by the name of the Hawk lode, made by said Carroll and Erhardt in virtue of a discovery of mineral-bearing rock in place on said premises, made by said Carroll and Erhardt long prior to any discovery or location thereof, or any part thereof, by said Hull and Boaro.

And affiant, on his oath, further says that on a certain day, to wit, about the middle of July last, he was present on said mining premises, and, having seen the discovery stake of the said Hawk lode mining claim, or deposit, and the notice thereon, which contained a statement of the names of the locators thereof, to wit, Thomas Carroll and Joel B. Erhardt, the name of the lode, to wit, the Hawk lode, and the date of discovery, which affiant, to the best of his recollection, says was about the 14th or 15th of June, 1880, and which he is certain was not later than the 20th of June, 1880, had a conver-

47 sation with the aforesaid Anthony Boaro, who was then present in which conversation affiant called the attention of the said Boaro to the discovery stake aforesaid of the Hawk lode which he had found, and to the notice thereon, and to the fact that the date of discovery mentioned in said notice on said Hawk lode discovery stake was prior to the date of discovers as claimed on the stake of the said Johnnie Bull lode claim, and said Boaro then and there stated in reply that the said notice on the said discovery stake of the Hawk lode was not a good and sufficient notice, because it did not state the course and direction of the vein claimed, nor the number of feet claimed, and that by reason of the defect in said Hawk discovery notice they, meaning the said Boaro and Hull, would hold the claim in spite of hell.

And affiant further says that at said time and place, or at a subsequent time, about the second week in August of the same year, when affiant was again on the said premises, and in the presence of said Boaro, but affiant cannot distinguish at which of said times the said Boaro said that the Johnnie Bull location was good, and that he, Boaro, would kill the said Carroll or any one else if they
48 should attempt to work the said Hawk claim, or they would have to kill him, Boaro.

And affiant further says that at the point where the Johnnie Bull assessment work was done, and in the immediate vicinity, there is, within a few inches from the surface, a large body of mineral-bearing rock in place plainly visible, being the same body of mineral upon which the Johnnie Bull workings have been prosecuted, and that a few feet from the said working there is also plainly visible an outcrop of said body of mineral, consisting of burnt lime, yellow iron, and other mineral-bearing rock.

JOHN J. COHNNAN.

Subscribed and sworn to before me, this 7th day of May, 1881.

L. V. ROSSER,

Judge and ex-officio Clerk County Court, Dolores County, Colorado.

And the affidavit of A. Frank Carll, above referred to, being in words and figures following, to wit:

49 UNITED STATES OF AMERICA, *District of Colorado.*

In the Circuit Court of the United States for the District of Colorado. In Chancery.

JOEL B. ERHARDT, Complainant,

vs.

ANTHONY BOARO *et als.*, Defendants.

A. Frank Carll, being duly sworn, on his oath deposes, and says: That he is a citizen of the State of Colorado, and a resident of the town of Rico, in the county of Dolores, in said State.

Affiant further says *the* he is personally acquainted with one Anthony Boaro and one W. L. Hull, both residents of said town of

Rico, who claim to be the owners by virtue of a discovery and location, as they claim, of a certain mining premises lying and being situate in Pioneer Mining District, in the county and State aforesaid, and claimed by them as the Johnnie Bull lode or deposit.

Affiant further says that he is personally acquainted with one Thomas Carroll, at said town of Rico, and one Joel B. Erhardt,
50 of the city of New York, who claim to be the owners of a great portion of the said premises under and by virtue of a location thereof by the name of the Hawk lode, made by them pursuant to and in virtue of a discovery of mineral on said premises when the same was vacant, unoccupied mineral lands of the United States, and long prior to any discovery or location thereof by said Boaro & Hull, and in full compliance, as claimed by them, with all rules, laws, and customs pertaining to the location of mining claims.

Affiant further says that on a certain Sunday in the last week of August, or the first week of September last, at a certain cabin in Horse Gulch, known as Max's place, about one mile from the town of Rico, the said Boaro, in conversation with affiant, one Donald McIntyre, and one William H. Bennetts, respecting the validity of the said Johnnie Bull lode claim, stated and admitted that prior to any discovery of mineral on said premises by himself, or said Hull, or any location thereof by either of them the said Carroll had discovered a mineral-bearing vein or deposit thereon, and at the point of his discovery had erected a stake with a written notice thereon containing a statement of the name of the lode
51 he had discovered, the date of his discovery, and the name of himself and Erhardt as the locators thereof, and also a claim of fifteen hundred feet along the course of the vein. And said Boaro then and there further stated that, after the discovery and staking by said Carroll, as aforesaid, and before the expiration of the period of sixty days from the date thereof, he, the said Boaro had thrown away said stake, and at the point of said Carroll's discovery he then and there erected the Johnnie Bull stake, and completed a full location assessment. And Boaro then and there, in said conversation, further stated as the ground and reason of the location by himself of said premises, as aforesaid, the fact that the notice on Carroll's said stake failed to state the course and direction of the vein upon which he claimed, and that by virtue of the said defect in said notice, as well as by reason of the fact that he had completed a location assessment before Carroll had done so, he claimed that the Johnnie Bull claim was good, and that he would shoot any son of a bitch who should attempt to interfere with the same.

And further affiant saith not.

52 A. FRANK CARLL.

Subscribed and sworn to before me, this 7th day of May, 1881.

[L. S.] L. V. ROSSER,

Judge & ex-officio Clerk County Court, Dolores County, Colorado.

The affidavit of Ellis B. Edwards, hereinbefore referred to, being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado.*

In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Complainant,
vs.
ANTHONY BOARO *et als.*, Defendants. } In Chancery.

Ellis B. Edwards, being duly sworn on his oath, deposes and says: That he is personally acquainted with Anthony Boaro, W. L. Hull, and Eugene B. Cushing. That on the first day of November, 1880, he served upon each of them, in person, a notice, a copy of which is hereto attached and marked A, and made part hereof.

53 Affiant further says: That he has frequently visited the premises claimed by Joel B. Erhardt and Thomas Carroll as the Hawk lode mining claim, and by Anthony Boaro and W. L. Hull as the Johnnie Bull lode mining claim. That on each visit he made a careful examination of the working thereon and of the mineral formation, and states that the body of mineral upon which the alleged Johnnie Bull location assessment was performed is well defined, plainly visible, and in place within a few inches from the surface of the ground, and would have been plainly disclosed by a prospect digging of less than eighteen inches in depth.

ELLIS B. EDWARDS.

Subscribed and sworn to before me, this 10th day of May, 1881.

L. V. ROSSER,
Judge & ex-officio Clerk County Court, Dolores County, Colorado.

The notice above referred to as being attached and marked A, being in words and figures following, to wit:

A.

To W. L. Hull, Anthony Boaro, and all whom it may concern:

54 Notice is hereby given that we, the undersigned, Joel B. Erhardt and Thomas Carroll, citizens of the United States of America, do hereby protest against the possession, occupation and enjoyment by you, or either of you, or by any person whatsoever, claiming by, through, or under you, of the surface-ground, veins, or lodes claimed by said Hull and Boaro, under and by virtue of their pretended discovery, location, and record of the so-called Johnnie Bull lode mining claim, as set forth in the pretended certificate of location thereof, filed for record and recorded in the office of the recorder of deeds of Ouray county, State of Colorado, for the reasons that the said surface-ground and veins, or lodes, are not your property, nor are you entitled to hold the same by virtue of the local laws, customs, and rules of miners [of] this, the Pioneer District, the laws of the State of Colorado, nor the statutes of the United States.

That the said surface-ground, veins, or lodes, are, in fact, the premises claimed and owned by the undersigned as the Hawk lode, by virtue of the valid discovery, location, and record of the said

Hawk lode or mining claim made by the undersigned in strict compliance with said local laws, rules, and customs, and the laws of the State of Colorado and of the United States, while the same
55 was vacant mineral lands of the United States, free and open to exploration, occupation, and purchase, long prior to any pretended discovery or location thereof by the said Hull and Boaro, or any other person or persons.

And the said Hawk lode or mining claim has ever since and continuously been occupied and possessed by the undersigned as aforesaid under and by virtue of their said discovery, location, and record.

And you are hereby further notified forthwith to vacate the said premises, to cease all work and trespassing thereon, to deliver possession of same to the undersigned; in default whereof you, and each of you, will be held and treated as trespassers, and required to account for the price and value of all mineral heretofore or hereafter taken from the said premises, or from any lodes or veins thereon.

JOEL B. ERHARDT.
THOMAS CARROLL.

Rico, Colorado, November 1st, 1880.

The affidavit of Allin Binns, above referred to, being in words and figures following, to wit:

56 UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado
In Chancery.

JOEL B. ERHARDT, Complainant,
vs.
ANTHONY BOARO *et als.*, Defendants.

Allin Binns, being duly sworn, on his oath deposes and says: That he is a citizen of State of Colorado, and a resident of the town of Rico, in the county of Dolores, in said State.

Affiant further says that he is a prospector by trade, and has as such had many years experience. He further says that between the 15th and the 25th days of June, 1880, while prospecting in Pioneer Mining District, in the county and State aforesaid, he came upon a prospect digging on the premises now claimed by Thomas Carroll and Joel B. Erhardt as the Hawk lode mining claim, and by Anthony Boaro and W. L. Hull as the Johnnie Bull lode mining claim, and saw erected near said digging a stake with a notice in writing thereon, signed Thomas Carroll & Joel B. Erhardt, claiming a location upon the vein or deposit by the name of the Hawk lode,
57 and bearing a then recent date, which, however, affiant cannot now recall. Affiant further says that he has not visited the said premises but once since the time above mentioned; that when last he was there the ground was covered with snow, and he was then unable to identify the exact spot at which he saw the said digging and said stake, and thinks that said spot is the point where

the Johnnie Bull location working was done. He is positive, however, that said Johnnie Bull working is not more than a few feet distant from the said point at which said Carroll's and Erhardt's stake stood when he saw it upon the occasion first above stated.

And affiant further says that said digging which he saw in his said first visit to the said premises, disclosed, within a few inches from the surface, a body of mineral in every way resembling the body of mineral upon which the Johnnie Bull location assessment was performed, and, as affiant believes, the same body of mineral.

Further affiant saith not.

ALLIN BINNS.

Subscribed and sworn to before me, this 7th day of May, 1881.

L. V. ROSSER,

Judge & ex-officio Clerk County Court, Dolores County, Colorado.

58 The affidavit of Patrick Cain, heretofore referred to, being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Complainant, }
vs. } In Chancery.
ANTHONY BOARO ——, Defendants. }

Patrick Cain, being duly sworn, on his oath deposes and says: That he is a citizen of the State of Colorado, and a resident of the town of Rico, in the county of Dolores, in said State.

Affiant further says that while prospecting in the month of June, 1880, with one S. C. Grant, on the divide between the West Dolores and the east fork of Horse creek, in Pioneer Mining District, in the county and State aforesaid, they saw at a point on said divide the outcrop of a load- or body of mineral. That he has since visited the working of the Johnnie Bull mining claim on said divide, and states that at the point where the location assessment of said Johnnie Bull claim has been performed the body or vein of mineral
59 upon which the same was done appears plainly visible and in place within less than two feet from the surface; and that, to the best of his recollection, the said assessment was done and performed on said body of mineral at the very point at which himself and said Grant saw said outcrop; he is certain that it is not distant from said point more than five or six feet.

PATRICK CAIN.

Subscribed and sworn to before me, this 10th day of May, 1881.

[L. S.] L. V. ROSSER,

Judge & ex-officio Clerk of County Court, Dolores County, Colorado.

The affidavit of S. C. Grant, hereinbefore referred to, being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado.
In Chancery.

JOEL B. ERHARDT, Complainant,
vs. } 118.
ANTHONY BOARO *et als.*, Defendants.

S. C. Grant, being duly sworn, on his oath deposes and says: That he is a citizen of the State of Colorado, and a resident of the county of Dolores, in said State.

60 Affiant further says: That in the month of August, 1879, while prospecting with one Worden Grigsby on the the divide between the East Dolores and the east fork of Horse creek, in Pioneer Mining District, in the county and State aforesaid, said Grigsby and himself discovered, at a point on said divide, the outcrop of a lead or body of mineral-bearing rock in place; that he has since then visited the premises on said divide claimed by Carroll and Erhardt as the Hawk lode mining claim, and by Hull & Boaro as the Johnnie Bull lode mining claim, and also the location working of the said alleged Johnnie Bull claim.

And he further says: That the said Johnnie Bull working has been performed at the very point at which he and Grigsby made their said discovery, and that the body of mineral upon which said assessment working was done is plainly visible and in place within eighteen inches or two feet from the surface of the earth at said point, at which himself and said Grigsby saw the said outcrop of said lead.

And further affiant saith not.

S. C. GRANT.

Subscribed and sworn to before me, this 10th day of May, 1881.

L. V. ROSSER,

61 *Judge & ex-officio Clerk County Court, Dolores County, Colorado.*

The affidavit of Worden Grigsby, hereinbefore referred to, being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado
In Chancery.

JOEL B. ERHARDT, Complainant,
vs.
ANTHONY BOARO *et als.*, Defendants.

Worden Grigsby, being duly sworn, on his oath deposes and says: That he is a citizen of the State of Colorado and a resident of the town of Rico, in the county of Dolores, in said State.

Affiant further says that he has been for six or seven years, and is now, a prospector. That on the 7th day of August, 1879, while prospecting, in company with one S. C. Grant, on the divide between

the West Dolores and the east fork of Horse creek, in Pioneer Mining District, in the county and State aforesaid, he saw plainly visible, at a point on said divide, what he, affiant, considered to
62 be the outcrop of a lead or vein of mineral. Affiant has not visited the said divide since the occasion above referred to, and, therefore, cannot say whether the Johnnie Bull or Hawk location was made on that vein or not.

WORDEN GRIGSBY.

Subscribed and subscribed to before me, this 10th day of May, 1881.

[L. S.] L. V. ROSSER,
Judge and ex-officio Clerk County Court, Dolores County, Colorado.

The affidavit of Charles A. Jones being in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado.
In Chancery.

JOEL B. ERHARDT, Complainant,
vs.
ANTHONY BOARO *et als.*, Defendants.

Charles A. Jones, being duly sworn, on his oath deposes and says: That he is one of the publishers and proprietors of the Dolores News, a newspaper of general circulation, published in the town of Rico, in the county of Dolores and State of Colorado. That a
63 notice, of which a printed copy is hereto attached, was first published in said newspaper in its issue dated the 6th day of November, 1880, and in each issue for three consecutive weeks thereafter.

CHAS. A. JONES.

Subscribed and sworn to before me, this 9th day of May, A. D. 1881.

[L. S.] L. V. ROSSER,
Judge & ex-officio Clerk County Court, Dolores County, Colorado.

The said printed notice above referred to, and attached to the foregoing affidavit of Chas. A. Jones, being in words and figures following, to wit:

Notice.

To whom it may concern:

Notice is hereby given that the surface ground and veins or lodes claimed by W. L. Hull and Anthony Boaro, by virtue of their pretended discovery, location, and record of the pretended Johnny Bull lode or mining claim are not the property of the said Hull and Boaro, or any other person or persons claiming by, through, or

under them, but are the property of the undersigned, J. B. Erhardt and Thomas Carroll, under and by virtue of a valid discovery, location, and record of the Hawk lode or mining claim made by them in full compliance with the local laws, rules, and customs of miners of Pioneer Mining District, the laws of the State of
64 Colorado, and of the United States, while the said premises were vacant mineral lands of the United States, free and open to exploration and purchase long prior to any pretended discovery, location, and record thereof by said Hull and Boaro, or any other person or persons whatsoever. And all persons are warned that said Hull and Boaro, and any and all persons claiming through or under them, are and will be held and treated as trespassers upon the said premises.

J. B. ERHARDT.
THOMAS CARROLL.

RICO, COLORADO, *November* 1, 1880.

And afterwards and on, to wit, the 18th day of June, 1881, came the defendants, Anthony Boaro, William L. Hull, Eugene B. Cushing, and August Krille, by Markham & Patterson, their solicitors, and filed in said court and in said cause their answer to the bill of complaint heretofore filed herein, and also filed the affidavits of Finney Jones, William Frazier, W. L. Hull, and Isaac C. Bateman.

The said answer of defendants being in words and figures following, to wit:

65 In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Complainant, *vs.* ANTHONY BOARO, *et als.*

The answer of Anthony Boaro, William L. Hull, Eugene B. Cushing, and August Crille, defendants, to the bill of complaint of the above-named plaintiff.

The said defendants having reserved to themselves all benefits and advantages of exception or otherwise to the said bill of complaint, for answer to the said bill, or so much thereof as these defendants are advised is material or necessary for them to make answer unto, answer and say:

First. That they are not advised, and do not know, and are therefore unable to answer from their belief or otherwise, whether or not the said plaintiff entered into the said contract mentioned in the bill of complaint with said Thomas Carroll, by which he was to explore and search for in the public domain of the United
66 States gold and silver-bearing veins or lodes; nor do they know, nor are they able to answer from belief or otherwise, as to what the terms of said alleged contract were.

Second. They deny that on or about the 17th day of June, A. D. 1880, that the said Thomas Carroll discovered in the Pioneer Mining District, in the county of Dolores, then in the county of Ouray, and State of Colorado, upon the divide within said district between Horse Gulch and the West Dolores river, about four and one-half

miles westerly from the town of Rico, upon the vacant and unoccupied lands of the public domain of the United States, a lode or vein of rock in place, bearing gold or silver; and they further deny that the said Carroll or any one in his behalf, upon the 17th day of June, 1880, or at any other time, commenced to sink a discovery shaft upon the vein claimed in said bill to have —— discovered, or upon any other vein or lode upon the said divide between Horse Gulch and West Dolores river; and they also deny that he sunk such shaft to the depth of two feet, or to any other depth; and they deny that

67 said Carroll posted at the alleged place of discovery of said lode any sign or notice which contained either the name of said lode, to wit, the Hawk lode, or the date of discovery thereof, to wit, the 17th day of June, 1880, or the names of the said Carroll and the complainant in said suit as the discoverers thereof, or that the alleged sign or notice set forth that they claimed fifteen hundred feet in length upon said lode.

They further deny that said Carroll intended in good faith to complete the said alleged discovery shaft within sixty days from the alleged discovery of said lode to the depth of ten feet, or to any other depth.

And they further deny that the said Carroll intended to do any of the other matters and things as alleged in said bill of complaint which were necessary to be done to enable him to locate a mining claim upon the said alleged discovered lode and vein.

They further deny that the said Carroll, had it not been for the acts and declarations of the defendants, or either of them, would have completed said alleged discovery shaft to the depth of ten feet, or to any other depth.

They admit that on the 30th day of June, A. D. 1880, that the defend-

68 ant Anthony Boaro, discovered a lode and vein of mineral-bearing rock in place upon the said divide between Horse Gulch and West Dolores river, and that the said Boaro and Hull entered thereon and sunk a discovery shaft, and did claim that they then and there discovered the said lode; but they deny that upon the last-mentioned date or at any other time the said Carroll and complainant, or either of them, were temporarily absent from the said alleged Hawk lode, and they deny that they entered thereon in their absence; and they deny that in sinking said shaft they entered into any shaft theretofore commenced by said Carroll or complainant.

They deny that they pulled up and carried away and concealed any stake and notice which the said Carroll, or any one in his behalf, had erected thereat; and they deny that their claim to the discovery of said lode or vein was false; and they deny that they pretended or claimed that any alleged notice by the said Thomas Carroll claimed to be erected at the alleged point of discovery of said Hawk lode was invalid and ineffectual for any reason whatsoever; but

69 they admit that they did locate upon the said lode so discovered by the said Boaro a mining claim, and that they called the same the Johnny Bull lode and claim; that they claimed said lode for the length of fifteen hundred feet along the vein thereof, six

hundred feet running north, and nine hundred feet running south from the center of the discovery shaft, so by them excavated, with surface ground three hundred feet in width one hundred and fifty feet on either side of the center of said lode, and they admit that they began to work and to mine therein. They admit that within sixty days of the 17th day of June, the said defendants Boaro and Hull did sink and complete upon said vein at the point of discovery a discovery cut, and that it was more than ten feet in depth upon the said vein, and that there was exposed in the bottom thereof a well-defined crevice of rock in place bearing silver. They deny that immediately upon entering into possession of the said lode or at any other time the said Boaro & Hull, or either of them, began to give out in speeches that the said Carroll and com-
70 plainant herein could not and should not enter into or upon said lode or premises by them claimed as the Johnny Bull lode. They deny that the said Boaro and Hull or either of them ever declared that they would shoot any person who should or might attempt to enter into or upon said premises. They admit that from the 30th day of June, 1880, and for the next sixty days or more, the said Boaro and Hull were in exclusive possession of said lode and the discovery shaft sunk thereon by them, but they were not in possession of any discovery shaft ever commenced by said Carroll. They deny that they were ever at any time in the possession of the said premises prior to the 30th day of June, 1880.

They deny that their possession thereof or of the shaft thereon nullified, and that by threats of violence the said Boaro and Hull or either of them prevented the said Carroll and complainant from completing any discovery shaft within sixty days from the said 17th day of June, or from any other time. They admit, upon information and belief, that upon the 8th day of September, A. D.
71 1880, the said complainant and Carroll made a claim or pretence of locating the so-called Hawk claim and lode, and that upon said day they marked the boundaries of said pretended claim by six posts or stakes, but whether they were marked on the inside of said pretended claim or not they cannot say, upon either information or belief.

They admit that the said pretended claim was so staked by them as to be three hundred feet in width and fifteen hundred in length, and that it was so staked as that it run nine hundred feet south from the centre of defendants' discovery shaft and six hundred feet north therefrom; but defendants deny, upon information and belief, that the said Carroll and complainant, or either of them, or any one in their behalf, ever had the said pretended claim surveyed, but, on the contrary, they aver, upon information and belief, that the said stakes were set without any survey whatsoever; and they aver that the said Carroll and complainant pretended to locate a mining claim with precisely the same boundaries and the same corners as the claim theretofore located and staked by the said Boaro and
72 Hull, and that the said stakes were set by the said Carroll and complainant precisely where the stakes of the Johnny Bull lode and claim were set by Boaro and Hull when they pre-

viously located the same, and that the discovery shaft from which the so-called Hawk lode and claim was located was the identical discovery shaft sunk by the said Boaro and Hull. Upon information and belief, they admit that on or about the 14th day of September, A. D. 1880, the said Carroll and complainant caused to be filed in the office of the recorder of said Ouray county a certain alleged certificate of location on the said pretended Hawk claim and lode; that the contents of the said alleged and pretended location certificate were as in said bill set forth; but they deny, upon information and belief, that the said courses and distances, as contained in the said pretended location certificate, were obtained by means of any survey upon the said premises by the said Carroll and complainant, or any one in their behalf, but, on the contrary, that they were substantially copied from the location certificate filed in said recorder's
73 office by Boaro and Hull.

They admit that the said Boaro and Hull, after the filing of the said pretended certificate of location, maintained possession of the said Johnny Bull lode and claim, and the discovery shaft sunk thereon, but they deny that they threatened the said Carroll or complainant with death in case they should attempt to enter upon the said location; but they admit that, after the said 8th day of September, A. D. 1880, they did assert that they would not permit the said Carroll or any one else to take possession of the Johnny Bull lode or claim or to work or mine therein.

Defendants admit that, upon the 8th day of September, 1880, they caused the said Johnny Bull lode and claim to be resurveyed, for the purpose of relocating the same, so that it might not conflict with the Mountain View lode No. 2, which was to the south thereof, and they caused to be made out a relocation certificate, and filed the same for record in the recorder's office of said Ouray county, now the county of Dolores, upon the 13th day of September, 1880; but they deny that the said claim as relocated was described
74 as in said bill averred, but they assert that the said claim as relocated in no manner changed the boundaries of that part of the claimed upon which the discovery shaft and their developments of the said lode were situated; and they admit that they still claim and hold possession of the said claim, as thus relocated; they admit that conveyances were made to the said August Krille, as averred in the said complaint, and that the said Krille and Cushing now have a claim and right, share, and interest in said lode; that as to whether or not the complainant caused to be published in the Dolores News a notice declaring and setting forth the asserted rights of the complainant and said Carroll in the pretended Hawk lode, and containing the other matter in said bill alleged, *complainants* (defendants) cannot say, except upon information and belief; and, upon information and belief, they admit that such notice was published, but was not so published until the latter part of October or the early part of November, 1880. They admit that a notice was served upon the parties mentioned
75 in said bill of the import as therein stated, but say that it was not served until about the dates last mentioned.

They admit that they are now holding and occupying the said claim, but they deny that they are doing so by the use of armed men, or in derogation of the rights and claims of others. They admit that they are working, mining, and extracting ore therefrom, but they deny that they are so doing in a reckless or unskilful manner, but aver that they doing so with utmost care and skill, and for the purpose of developing the said mine and demonstrating the value and importance thereof. They admit the said lode abounds in large quantities of rich ores, but they deny that the same is more easily worked than are other ordinary veins and lodes.

They admit that they have extracted from the said vein a considerable amount of ore, but whether the same is of the value of one hundred and fifty dollars per ton, or of the aggregate value of twenty-five thousand dollars, they are unable to state; and for further answer to the said bill of complaint the said defendants aver

76 that on the 30th day of June, A. D. 1880, while said Boaro was prospecting upon the unexplored public domain of the United States in the Pioneer Mining District, in the county of Ouray, now the county of Dolores, in the State of Colorado, he discovered a lode or vein of rock in place bearing silver on the divide in said district between Horse Gulch and the West Dolores river, and which lode or vein was upon the unexplored and unappropriated public domain of the United States; that within sixty days from the said date of discovery, he, with his co-defendant, William L. Hull, located the said lode or vein by sinking an open cut discovery shaft upon the same to the depth of more than twelve feet below the surface, and at the bottom of which open cut they cut the lode or vein, and there disclosed a well-defined crevice which was the same identical lode or vein heretofore referred to, and thereupon they caused the said lode or vein to be surveyed and posted at the point of discovery thereof at the surface a plain sign or notice, containing the name of the lode, to wit, the Johnny Bull lode, the names of the locators, to wit, Anthony Boaro and

77 William L. Hull, and the date of discovery thereof, to wit, the 30th day of June, A. D. 1880, and also marked the surface boundaries of said claim by six substantial posts, hewed and marked on the sides which were in towards the claim, and sunk the same in the ground, to wit, one at each corner of the claim and one at the center of each side line thereof; that said Boaro and his co-locator, William L. Hull, thereupon executed a location certificate for said claim, and which certificate contained the name of the lode, the names of the locators, the date of location, the number of feet in length claimed on each side of the center of the discovery shaft, to wit, six hundred feet north thereof and nine hundred feet south thereof, and also the general course of the said lode, with the description, to wit: Beginning at S. W. cor. 1, whence bears prom. P K N. 37° E.; thence east 300 ft. to S. E. cor. No. 2; thence north 750 ft. to east side center stake, 1,500 ft. to N. E. cor. No. 3, whence bears Elliot Mountain N. 67° 25′ E., Monument Peak N. 42° 35′ E.; thence west 300 feet to N. W. cor. No. 4; thence south 750 ft. to W. side center stake 1,500 ft., to cor. No. 1, place of beginning.

78 On divide between Horse Gulch and West Dolores, about 4½ miles N. W. of Rico, the discovery is a 12-ft. cut, whence bears Expectation Mountain south 39° 5′ E., which clearly identifies the said claim; and they thereupon, and upon the 20th day of August, A. D. 1880, filed the said location certificate for record in the office of the clerk and recorder of the then county of Ouray, in said State, in what is now the county of Dolores, being then a part of said Ouray county; that the said open-cut discovery shaft was completed on or before the 30th day of July, A. D. 1880; that at the time of the discovery of the said lode said Boaro examined the ground in all directions for more than fifteen hundred feet from the point of discovery, and there was no stake erected or to be discovered within said area; that the only evidence of any one having ever been upon the ground before the said 30th day of June was a hole, not to exceed ten inches in depth, and the same in width and length, and which was excavated wholly in the soil, and disclosed no formation of any kind, or lode, or vein, except the loose soil in which it was sunk; that between the date of discovery
79 and the 21st of July neither the said Boaro nor his co-locator did any work upon said lode, except to erect the discovery stake heretofore alluded to, and they visited the same but five or six times during that period; that they commenced sinking the discovery cut heretofore alluded to on the said 21st of July, 1880, and the said Hull worked continuously on the same thereafter until it was completed; that the whole heretofore referred to was distant some fifteen feet from the point of discovery of said lode, and was not upon the lode; that to discover said lode they were compelled to excavate the loose soil and earth which entirely covered the same to the depth of several feet; that from the said 21st day of July until the 15th day of October said defendant and his co-locator, by themselves or workman, were continuously in the possession of said claim, and during all of said period no person or persons, either for themselves or in behalf of others, and especially the said complainants or any one in their behalf, never appeared upon the said claim or in its vicinity, or made any claim or pretence whatsoever as the discoverers or owners of the said Johnny Bull lode
80 or claim, or to any part of it, under the name of the Hawk lode or claim, or in any other form or manner whatsoever, except as heretofore stated.

Said defendants further aver that on the 8th day of September, A. D. 1880, said Boaro employed one F. W. Gove to make a new survey of the said claim for the purpose of relocating it and avoid a conflict upon the south end of the Mountain View, No. 2, lode and claim, which was a subsequent discovery and location to that of the Johnny Bull lode; that after the said Gove had made his survey for the purpose aforesaid, he, with his assistant, as defendants aver upon information and belief, at the instigation of the said Carroll, went to the said Johnny Bull claim and threw down stakes directly at the points occupied by the stakes of the first location of the said claim, and did so without any survey, and by such methods in-

cluded the precise ground theretofore occupied by the said Johnny Bull claim within the said pretended Hawk claim.

And defendants aver, upon information and belief, that the said 8th day of September, 1880, was the first time the said com-
81 plainants made any claim or pretence to any part of the ground or vein called and designated the Johnny Bull lode and claim, and they aver that so far as defendants are concerned they never until that time heard or supposed that any one, and especially the said Carroll and complainant, made any claim of any kind to the discovery or ownership of any part of said Johnny Bull claim, whether under the name of the Hawk lode or any other.

Defendants further aver that, for the purpose aforesaid, and solely for that purpose, they relocated the said Johnny Bull claim, by causing the same to be resurveyed, and by placing stakes at each of the four corners and one at the centre of each side-line, said stakes being hewed in towards the surface of said claim; that they afterwards executed, and caused to be filed for record in the office of the recorder of deeds in and for said Ouray, a relocation certificate, and therein the said claim is described as follows: Beginning at the N. E. corner, it being corner No. 1, whence bears Elliott mountain N. 67° 25′ E., and a mountain called Lizard Head, N. 42° 35′ E.; thence west 300 feet to the N. W. corner, it being corner No. 2;
82 thence S. 618.36 ft. to west side angle stake; thence south 42° W. 897.5 feet to southwest corner, it being corner No. 3; thence east 463.6 ft. to S. E. corner, it being corner No. 4; thence north 42° E. 742.5 ft. to east side angle stake; thence north 741.64 feet to the northeast corner, it being corner No. 1, the place of beginning; the said claim is situated on the divide between West Dolores and the east fork of Horse creek, about 4 miles N. W. of Rico.

Defendants further aver that ever since the said relocation of said claim they have been in the complete possession of the same, except for a few days in the month of ———, at which time the said complainants, by armed men and by subterfuge and deceit, obtained possession, but plaintiffs were at once restored to their possession by the process of the proper court of the State, issued and executed by the proper officers in that behalf. Defendants further say that, with that exception, they have, ever since the discovery and location of the claim as aforesaid, been in the full, complete, and quiet possession and enjoyment thereof.

83 Defendants further aver that the claim of said complainants to same lode and vein is wholly fictitious and fraudulent; that they only asserted the said pretended claim when the same was discovered to be very valuable, and after the same had been developed by defendants, at great cost and labor, to contain large quaintities of rich and valuable ore.

And defendants further aver that the only threats ever uttered by any of them was by the said Anthony Boaro, and, on information and belief, they aver that said Boaro never made any threats against any one in connection with said claim and lode until some time

after the said staking of said claim by the said Gove and his assistant, and when he learned that the same had been done in behalf of complainant and the said Carroll, the same being long after the period within which the said Carroll had any right to sink a discovery shaft, even if he had discovered the lode, as claimed in said bill; but defendants say, on information and belief, that the said Boaro only upon such occasions said that he would defend his claim from any one who should attempt to drive him therefrom by
84 force; that he had discovered the claim, and it was honestly the property of said Boaro and his co-defendant, Hull, by virtue thereof, and they deny positively any other or different threats. And these defendants say that they submit to the judgment of the court whether, upon the full consideration of all the facts as contained in this answer, and the proofs that may be adduced in support thereof, the injunction and other relief prayed for by the plaintiffs should be allowed, and they submit to act as the honorable court shall direct, being indemnified and paid their costs and charges and expenses therein. And these defendants deny all confederation and confederacy with which they are charged in and by the said bill, without this, that, &c.

ANTHONY BOARO.
WM. L. HULL.
EUGENE B. CUSHING.
AUGUST KRILLE.
By MARKHAM & PATTERSON,
Their Solicitors.

UNITED STATES OF AMERICA, }
State of Colorado, } ss:

85 In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Comp't,
vs.
ANTHONY BOARO *et als.*, Def'ts.

August Krille, being first sworn, according to law, deposes and says: That he is one of the defendants in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to them he believes it to be true.

AUGUST KRILLE.

Subscribed and sworn to before me, this 1st day of October, 1881.
MOSES HALLETT,
District Judge.

It is hereby stipulated that the foregoing affidavit to the defend-

ants answer herein, shall stand as having been made and filed before the granting and issuing of the temporary injunction in said cause.

J. M. SAMPLE,
H. C. THATCHER,
86 WELLS, SMITH & MACON,
Solicitors for Complainant.
T. M. PATTERSON,
JULIUS THOMPSON,
Solicitors for Def'ts.

The affidavit of Finney Jones, heretofore referred to, being in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Dolores, }

Finney Jones, being first duly sworn according to law, deposes and says: That he is acquainted with the Johnny Bull mining claim, situated in Horse Gulch, about five miles from the town of Rico, in said county and State, and has well known the ground covered by the same since the 24th day of June, 1880; that he is also well acquainted with Thomas Carroll, one of the claimants and one of the pretended locators and owners of the pretended Hawk lode claim, claimed to cover a portion of the ground covered by the said Johnny Bull claim; that from the second day
87 of June to about the 18th day of July, 1880, deponent and the said Carroll were prospecting for mineral and camping together; that every night during that time, excepting Saturday and Sunday nights, deponent and said Carroll camped and slept together, and also excepting the night of the 5th of July, 1880. Deponent well remembers that, on the evening of the 17th day of June, A. D. 1880, the said Carroll, on the evening thereof, informed deponent when he had been prospecting or searching for mineral during that day, stating to deponent that during that day he, the said Carroll, had not located any mining claim or claims, but that he had been prospecting for mineral on the south side of Calico mountain, near what is known as the Sulphur springs, and that he had discovered a lead of mineral, but had not located it, and that he, deponent, could go and locate the same if he desired, describing to deponent the location of the discovery, which lode deponent accordingly located on the 18th day of June, 1880, calling the same Robin lode, which lode is situated above said springs 1,200
88 or 1,500 feet; that said springs and said Robin lode is situated about one mile across Calico Mountain from the said Johnny Bull lode claim. That the place at which deponent and the said Carroll camped on the night of the 17th of June, 1880, is about 3 miles south of the Johnny Bull claim and across Calico Mountain. That Calico Mountain is a high precipitous mountain running several hundred feet above timber line. That deponent and said Carroll camped alone, and that they usually talked in the evenings about the claims that they had located during the day; that at no time, either on the 17th of June, 1880, or at any subsequent date

prior to the 30th day of August, 1880, did deponent ever hear said Carroll claim to have made either a location by the name of the Hawk lode or any location whatever upon ground covered by the Johnny Bull lode claim. Deponent further says that, on the 21st day of July, 1880, he went up to the Johnny Bull claim from the town of Rico, and on the next day commenced work upon said claim, and from then until the 30th day of August succeeding, was working near said claim; that during all that time
89 he did not see the said Carroll either on or in the vicinity of the Johnny Bull claim, but, on the said 30th day of August, the said Carroll came to the cabin occupied by deponent and situated near the Johnny Bull claim, and said to deponent that he had heard a good deal of talk about the Johnny Bull mine and had come to see it, and that he had not been in said vicinity since he and deponent quit prospecting. And further deponent saith not.

FINNEY JONES.

Subscribed and sworn to before me, this 31st day of May, A. D. 1881.

[L. S.] ALFRED H. MUNDEE,
Notary Public.

The affidavit of Wm. Frazier, hereinbefore refer-ed to, being in words and figures following, to wit:

STATE OF COLORADO, }
County of Dolores, } ss:

Wm. Frazier, being duly sworn according to law, deposes and says: That he has been well acquainted with the ground covered by
90 the Johnny Bull mining claim, situated in Horse Gulch, in said county and State, ever since June 4th, 1880; that he is one of the owners of the Mountain View lode claim adjoining the Johnny Bull claim; from June 16th to June 25th, 1880, deponent was daily upon the ground covered by the two lode claims above referred to, and is positive that there was no location stake under the name of the Hawk lode upon said Johnny Bull claim between those dates; that between these dates deponent was examining the ground covered by the Johnny Bull claim and vicinity for the purpose of finding an old location made by deponent's partner, J. M. Conner, in the year 1879, and that his search took him repeatedly over various parts of the surface ground covered by said Johnny Bull claim; that after the 25th day of June until the 8th of July, 1880, deponent was also upon the ground covered by the Johnny Bull claim very frequently; that at no time did he see the Hawk lode location stake upon said ground; that deponent is well acquainted with the position of the Johnny Bull discovery shaft; that from the 4th of June to about the 8th of July, 1880, deponent passed over the ground where said shaft is situated a great many times, and that at no time did he ever see the Hawk
91 lode location stake at or near the said shaft; that the ground surrounding the Johnny Bull discovery shaft is free from

shrubs and sufficiently clear of rubbish so that had there been a location stake in the vicinity of said shaft it would have been easily discovered during the period above referred to. Deponent further says that he has frequently seen the Johnny Bull location stake immediately after the same was located; that previous to the location of said Johnny Bull claim there was not, within the knowledge of deponent, any vein of mineralized matter in place discoverable upon the surface ground of said claim; that prior to the Johnny Bull location that no work in the way of excavating for mineral had been done upon said Johnny Bull claim except the removal of a small amount of surface dirt near the Johnny Bull discovery shaft; that prior to the Johnny Bull discovery no work or excavation upon said ground had been done disclosing a vein of mineral in place upon said ground.

WM. FRAZIER.

Subscribed and sworn to before me, this 31st day of May, A. D. 1881.

[L. S.] ALFRED H. MUNDEE,
Notary Public.

92 The affidavit of W. L. Hull, hereinbefore referred to, being in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Dolores, }

W. L. Hull, being duly sworn according to law, deposes and says: That he is one of the owners and original locators of the Johnny Bull lode mining claim, situate in Horse Gulch, in said county and State. I never at any time have seen a discovery stake of what is called the Horse lode anywhere upon the Johnny Bull mining claim; the Johnny Bull lode mining claim has been worked by myself and co-owners continuously ever since the 21st day of July, 1880, without any interruption of possession until the owners of said Johnny Bull claim were dispossessed on the 1st day of March, 1881. Deponents statement as to the working and possession of said mine from the 21st day of July to the 1st day of November, 1880, is based upon his own knowledge, he having worked on the mine during that time; his statement as to working and possession of the mine from November 1st, 1880, until March 1st, 1881, is based upon information and

93 belief. Deponent further says that he and his co-owners are, at the date hereof, in the possession of said Johnny Bull claim. Deponent further says that prior to the 1st day of November, 1880, no mining or other work in the nature of mining upon the surface ground of the Johnny Bull claim, excepting that done by the claimants of said claim or those employed by them, had ever been done upon said claim, excepting a small hole or excavation made, as deponent is informed and believes, by one Patrick Cain and S. C. Grant, in the loose or made soil, and about 15 feet from the discovery shaft of the Johnny Bull claim; that said hole did not exceed 18 inches in depth, and that the amount of earth taken there-

from could not, at the most, have exceeded one and a half cubic feet; that the said hole did not disclose mineral or any other portion of the earth's crust in place, but was entirely surrounded by loose-made earth or surface deposit; that at no point or place upon said Johnny Bull claim does a vein of mineralized matter *in* disclose itself at the surface of the ground; that no such vein was discoverable upon the surface of said claim at the time the said
94 Johnny Bull lode was located; that deponent is very familiar with the entire surface ground covered by said Johnny Bull claim, and that there is not, within his knowledge, any point or place upon said claim where mineral has been discovered in a vein in place, excepting at the point of discovery by the locators of said Johnny Bull claim. Deponent further says that prior to the first day of November, 1880, no person or persons ever made any demand upon deponent, or in his presence or within his knowledge, upon any claimant or employee of any of the claimants of said Johnny Bull claim, asking or demanding permission or claiming any right to work or mine upon the surface ground covered by said Johnny Bull claim, under and by virtue of the Hawk lode claim or location. Deponent further says that from the 21st day of July to the 1st day of November, 1880, to the best of deponent's knowledge, information, and belief, Thomas Carroll, one of the claimants and pretended locators of the pretended Hawk lode above referred to, continuously resided at the town of Rico, about 5 miles from said Johnny Bull claim; and that during all that time deponent frequently met the said Thomas Carroll in the said town of Rico; that from and after the 6th day of August, 1880, it, the said Johnny Bull
95 claim, was generally and familiarly known in the said town of Rico as a valuable mining claim; and deponent further says that on the 30th day of August, 1880, deponent met the said Thomas Carroll upon the surface ground of the said Johnny Bull claim and conversed with him, but that the said Thomas Carroll neither, at that time nor at any other time prior to the 1st of November, 1880, ever claimed to deponent, or in any manner suggested to deponent, that he, the said Carroll, claimed any interest whatever in the ground covered by the said Johnny Bull claim, or any part thereof.

And further deponent saith not.

W. L. HULL.

Subscribed and sworn to before me, this 31st day of May, A. D. 1881.

[L. S.] ALFRED H. MUNDEE,
Notary Public.

96 The affidavit of Isaac C. Bateman, hereinbefore referred to, being in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Pueblo, }

Isaac C. Bateman, being first duly sworn according to law, upon

oath states as follows: That he is a citizen of the United States and a resident of the State and county aforesaid and over the age of twenty-one years; that he well knows that particular mining claim or lode known as the Johnny Bull lode, situate in Pioneer Mining District, in the county of Dolores and State of Colorado, and was frequently upon the surface ground of said claim from the seventeenth day of June, 1880, to the twenty-seventh day of the same month, and never at any time between those dates saw a discovery stake of any kind; though he prospected said ground thoroughly.

Deponent further states that on the thirtieth day of June, A. D. 1880, while prospecting in the vicinity of said claim, he saw Anthony Boaro prospecting upon the ground of said claim, or what is
97 now the Johnny Bull claim, and distinctly saw him set a discovery stake upon said ground, said stake being at or near the point where the Johnny Bull lode discovery work was afterward done. Deponent further avers that his occupation is that of a mining prospector, and that he was employed in said occupation during the spring and summer of the year 1880, and was during nearly all of that time in the mountains around Rico, in said Pioneer Mining District.

I. C. BATEMAN.

Subscribed and sworn to before me, this fourth day of May, A. D. 1881.

[L. S.] EPHRAIM J. CASTLE,
Notary Public.

And afterward, and on, to wit, the *the* 20th day of June, A. D. 1881, the same being one of the regular judicial days of the May term, A. D. 1881, of said court—present, the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States, assigned, and the Honorable Moses Hallett, district judge—an order for injunction was signed and entered of record in said cause;
98 said order being in words and figures following, to wit:

At a stated term of the circuit court of the United States of America for the district of Colorado, in the eighth circuit, held at Denver, in said district, on the 20th day of June, 1881.

Present: The Honorable Samuel F. Miller, one of the justices of the Supreme Court of the United States; the Honorable Moses Hallett, judge of the district court of Colorado.

JOEL B. EARHARDT, Complainant,
vs.
ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING, AUGUST KRILLE, and — HOLLABAUGH, Defendants. } In Equity.

Upon reading and filing notice of motion for injunction and proof of the service thereof, the bill of complaint, the answer thereto, the affidavits for complainant and defendants, and having heard counsel of the respective parties, and the court having duly considered the same, it is ordered by the court that a writ of injunc-
99 tion issue according to the prayer of complainant's bill upon

complainant filing with the clerk of this court his bond in the penalty of five thousand dollars, with surety or sureties, to be approved by the clerk, conditioned to make good to the defendants all damages which they may sustain (and all costs which may be adjudged against the complainant) by reason of the said injunction in case the same be dissolved.

June 20, 1881. SAM. F. MILLER, *Judge.*

And afterwards, and on the same day, to wit, the 20th day of June, A. D. 1881, came again the said complainant by his solicitors aforesaid, and filed in said court and in said cause his bond for and sued out of said court a writ of injunction.

The said bond being in words and figures following, to wit:

Know all men by these presents, that Joel B. Erhardt, of the city, county, and State of New York, as principal, and D. C. Dodge, of the
county Arapahoe, and State of Colorado, as surety, are held
100 and firmly bound unto August Krille, Eugene B. Cushing, Anthony Boaro, W. L. Hull, —— Hollabaugh, of the county of Dolores, and State aforesaid, in the full and just sum of five thousand dollars, to be paid to the said August Krille, Eugene B. Cushing, Anthony Boaro, W. L. Hull, —— Hollabaugh, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents. Sealed with our seals, and dated this 20th day of June, A. D. 1881.

Whereas the above bounden Joel B. Erhardt has filed his bill of complaint in the circuit court of the United States for the district of Colorado against the above-named Krille, Cushing, Boaro, Hull, and Hollabaugh, praying, among other things, for an injunction to restrain them, the said Krille, Cushing, Hull, Boaro, and Hollabaugh, from further working upon, or within the bounds of the Hawk lode in Pioneer District, Dolores county or extracting any rock or ore therefrom, or removing, concealing, selling, or disposing of any of the ore of said lode by them heretofore or before service of said writ mined thereupon;

And whereas the Honorable Moses Hallett, one of the
101 judges of said court, has allowed an injunction for that purpose, according to the prayer of said bill, upon the said Joel B. Erhardt giving bond and security as provided by law, and as required by the order of said judge granting said injunction:

Now, therefore, the condition of the above obligation is such, that if the above-bounden Joel B. Erhardt, their executors or administrators, or any of them, shall and do well and truly pay, or cause to be paid, to the said Krille, Cushing, Boaro, Hull, and Hollabaugh, their executors, administrators, or assigns, all such damages as shall be sustained by them by reason of said injunction, and such costs as shall be awarded against the said complainant in case the said injunction shall be dissolved, then the above obligation to be void; otherwise, to be and remain in full force and virtue.

JOEL B. ERHARDT. [L. S.]
DAVID C. DODGE. [L. S.]

Attest; E. T. WELLS.

Approved by me and filed this 20th day of June, A. D. 1881.
EDWARD F. BISHOP, *Clerk.*

102 The writ of injunction, hereinbefore referred to, being in words and figures following, to wit:

Writ of Injunction.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado*:

The President of the United States of America to Anthony Boaro, W. L. Hull, Eugene B. Cushing, —— Hollabaugh, and August Krille, and to your attorneys, solicitors, agents, employees, and servants, tenants, and all claiming under them, or either of them, and to each and every of them, Greeting:

Whereas it has been represented to the honorable the judges of the circuit court of the United States for the district of Colorado, on the part of Joel B. Erhardt, in his certain bill of complaint exhibited before said judges and filed in said court, against you, the said Boaro, Hull, Cushing, Hollabaugh, and Krille, to be relieved touching the matters and things thereon complained of; in which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that you- actions and doing- in the premises are contrary to equity and good conscience.

103 In consideration thereof, and of the particular matters in said bill set forth, you are hereby strictly commanded that you, the said Anthony Boaro, W. L. Hull, Eugene B. Cushing, —— Hollabaugh, and August Krille, and the persons before mentioned, and each and every of you, do absolutely desist and refrain from committing further waste in the Hawk lode in Pioneer Mining District, in the county of Dolores, and State of Colorado, described in the bill of complaint aforesaid, and bounded as follows, to wit: Beginning at corner No. 1, being the northeast corner of said claim, whence bears S. P. 6 in. diam. S. 2° E. 3 ft. dist., Elliot Mt. N. 67° 25′ E., Monument Peak N. 42° 35′ E; thence W. 300 ft. to N. W. cor. No. 2; thence S. 750 ft. W. side center post 1,500 ft. to S. W. cor. No. 3, whence bears from peak N. 37° E; thence E. 300 ft. to S. E. cor. No. 4; thence N. 750 feet to E. side center post 1,500 ft. to place of beginning; said claim being situate on divide between Horse Gulch and West Dolores about 4½ miles N. W. of Rico, or any part thereof, or mining therein, or within the bounds thereof, or extracting any ore or rock therefrom, until the final determination of the action at law now in said circuit court pending between said Joel B. Erhardt, as plaintiff, and you, the said Boaro, Hull, Cushing, Krille, and Hollabaugh, as defendants, and from removing, carrying away, concealing, selling, or disposing of any of the ore which by

104 you heretofore hath been, or at any time before service of this writ shall be, mined or extracted from said lode, and from preventing said Erhardt, his attorney, solicitors, counsel, agents, or

servants, from visiting and inspecting said premises and the bounds thereof, and the shafts, drifts, and other workings therein, during the pendency of said action at law, or until this honorable court in chancery sitting, or a judge thereof at chambers, shall make other order to the contrary. Hereof fail not, under penalty of what the law directs.

To the marshal of said district, to execute and return in due form of law.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in the district aforesaid, this 20th day of June, A. D. 1881, and of the Independence of the United States the 105th year.

[L.S.] EDWARD F. BISHOP, *Clerk.*

The aforesaid writ returned and filed in said court July 11, 1881, and bearing endorsements in words and figures following, to wit:

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

105 I hereby certify that I received the within writ on the 28th day of June, A. D. 1881, at 4.30 o'clock p. m., and that I have served the same upon August Krille, Anthony Boaro, W. L. Hull, and —— Hollabaugh, at Dolores county, Colorado, June 29th, 1881, by personally delivering a certified copy of the within to each of the above-named persons at the time and place above stated; as to Eugene B. Cushing, not found in my district.

P. P. WILCOX,
U. S. Marshal.
Per ISAAC YAHO,
Deputy Marshal.

Marshal's fees:
Service, 4 def'ts 8 00
Livery to serve 5 00

13 00 Paid by Wells, Smith & Macon

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

I hereby certify that I received the within writ on the 8th day of July, A. D. 1881, at 8 o'clock a. m., and that I have served the same upon Eugene B. Cushing, at Trinidad, in the county of Las Animas, State of Colorado, on this 8th day of July, A. D. 1881, by personally delivering a certified copy of the within writ to the above-named Eugene B. Cushing, at the time and place above stated.

P. P. WILCOX,
U. S. Marshal,
By H. L. PEARSON,
Deputy Marshal.

Marshal's fees:
Service $2 00
Mileage & postage ... 50

$2 50 Paid by Wells, Smith & Macon.

106 And afterwards, and on to wit, the 6th day of July, A. D. 1881, the same being one of the regular judicial days of the May term, A. D. 1881, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

For an Injunction and Other Relief.

JOEL B. ERHARDT
vs.
ANTHONY BOARO *et al.* } In Chancery.

At this day comes the said complainant, by Thomas Macon, Esq., his solicitor, and the said defendants, by T. M. Patterson, Esq., their solicitor, also come, and thereupon the said defendants, here in open court, move the court that this cause be transferred to the circuit court, sitting at Del Norte, for further proceedings therein according to law.

And the court being now fully advised in the premises, it is ordered that said motion be granted, and let the clerk of this court transmit without delay to said court the files herein, together with certified copies of all proceedings had herein.

107 Sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, } *ss:*

I, Edward F. Bishop, clerk of the circuit court of the United States, for the district of Colorado, do hereby certify that the above and foregoing is a true, perfect, and complete transcript and copy of all the orders had and entered of record in said court, and in the cause in said court now pending, wherein Joel B. Erhardt is complainant, and Anthony Boaro and others are defendants, as fully and completely as the same now remains of record in my office.

And I do further certify that the paper writings hereto attached and marked A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, and Y, are all the papers hereto filed in said court and in said cause.

In testimony to the above, I do hereunto sign my name, and affix the seal of said court, at Denver, in said district, this 15th day of July, A. D. 1881.

[L. S.] EDWARD F. BISHOP, *Clerk.*

Costs taxed in circuit court at Denver:

Plaintiff—	
Clerk's fees, p'd $10.00	$17 85
Marshal's fees, p'd 2.50	10 50
Defendant—	
Clerk's fees p'd	12 80

108 Pleas in the Circuit Court of the United States for the District of Colorado, sitting at Del Norte. September Term, A. D. 1881.

Present: Hon. Moses Hallett, district judge; Philip P. Wilcox, marshal, by L. M. Armstrong, deputy; Edward F. Bishop, clerk, by James W. Ross, deputy.

When the following proceedings were had and done, and entered of record:

JOEL B. ERHARDT
vs.
ANTHONY BOARO *et al.* } Equity.

This day come the said plaintiff, by Thomas Macon, his solicitor, and the said defendants, by Julius Thompson, their solicitor, also come, and the parties assenting thereto, it is ordered that this cause be transferred to the circuit court, sitting at Pueblo, for further proceedings therein according to law, and the clerk shall certify the transcript of the record herein, and the papers filed in this court, together with a transcript of the record of the proceedings of this court to the said circuit court at Pueblo without delay.

109 On September, 14, 1881, a stipulation was filed in said circuit court, at Del Norte, in said cause, in words and figures following, to wit:

UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Complainant.
vs.
ANTHONY BOARO *et al.*, Defendants. } In Chancery.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that the same be transferred to Pueblo, and that the motion to dissolve the injunction in said cause be continued until after the next trial of the action of ejectment now pending in said court, wherein the said Joel B. Erhardt is plaintiff and the said Anthony Boaro and others are defendants.

WELLS, SMITH & MACON, AND
J. M. SAMPLE,
Solicitors for Complainant.
THOMAS PATTERSON AND
JULIUS THOMPSON, *Atty's for Def'ts.*

110 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Sitting at Del Norte.

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify that the above and foregoing is a true, perfect, and complete transcript and copy of all the orders had and entered of record in said court and in the cause pending, wherein Joel B. Erhardt is complainant and Anthony Boaro and others are defendants, as fully and completely as the same now remains of record in my office. And I do further certify that the paper writings hereto attached are all of the papers heretofore filed in said court and in said cause.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court at Del Norte, in said district, this 15th day of September, A. D. 1881.

[L. S.]

EDWARD F. BISHOP, *Clerk.*
By JAMES W. ROSS, *Deputy.*

111 Pleas in the Circuit Court of the United States for the District of Colorado, sitting at Pueblo.

Be it remembered that, on the 1st day of October, A. D. 1881, the same being one of the judicial days of the special September term, 1881, of said court—present, Honorable Moses Hallett, district judge—an order was signed and entered of record in said court in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for said District, sitting at Pueblo.

JOEL B. ERHARDT, Plaintiff, *vs.* ANTHONY BOARO, WM. L. HULL, August Krille, and Eugene B. Cushing, Defendants.	In Chancery, for an Injunction and other Relief.

Come now the above-named complainant, by Thomas Macon and H. C. Thatcher, his solicitor-; and the said defendants, by T. M. Patterson and Julius Thompson, their solicitors, also come.

112 And thereupon the said defendants move the court to dismiss the bill of complaint herein, and also to dissolve the temporary injunction heretofore granted in this suit, for the reason that final judgment in favor of said defendants has been entered in the action at law between the above-named parties, and in aid of which the said bill of complaint was filed.

And the court, being sufficiently advised in the premises, doth order, adjudge, and decree that the said bill of complaint be, and the same is hereby, dismissed, and that the said defendants do have and recover of and from the said complainant their costs in this behalf expended, to be taxed.

And thereupon the plaintiff prays an appeal from said decree to the Supreme Court, and it is granted to him.

And it is ordered that plaintiff give bond in his said appeal in the sum of five thousand dollars, conditioned according to law, and with sureties, to be approved by one of the judges of this court.

And the court doth further order and decree that the temporary injunction heretofore ordered and issued in this suit, at the expiration of four months from this date, be, and the same is hereby, dissolved and held for naught, and the said injunction is hereby
113 perpetuated until the expiration of said period, when the same shall be held dissolved, unless the Supreme Court shall renew the same or otherwise order.

Oct. 1, '81. MOSES HALLETT,
District Judge.

114 And afterwards and on, to wit, the 22nd day October, A. D. 1881, come the said plaintiff, by Wells, Smith & Macon, his attorneys, and file herein an appeal bond in words and figures following, to wit:

Know all men by these presents that we, Joel B. Erhardt, as principal, and Edwin Einstein and Siro Delmonico, as sureties, all of the city of New York, in the county and State of New York, are held and firmly bound unto Anthony Boaro, William L. Hull, of the county of Dolores and State of Colorado, and August Krille and Eugene B. Cushing, of the county of Las Animas in the same State, in the penalty of five thousand dollars, for the payment of which well and truly to be made we bind ourselves, our executors and administrators, jointly and severally, firmly by these presents. Witness our hands and seals, on this 6th day of October, A. D. 1881.

Whereas the above-named Joel B. Erhardt hath prayed an appeal to the Supreme Court of the United States to review the decree lately and on the first day of October, A. D. 1881, made and given by the circuit court of the United States for the district of
115 Colorado, then sitting at Pueblo, in said district, in the certain cause then in said court depending between the said Joel B. Erhardt, as plaintiff, and the said Boaro, Hull, Krille, and Cushing, as defendants:

Now, therefore, the condition of this obligation is such that if the said Joel B. Erhardt shall prosecute his said appeal to effect and answer all costs and damages, if he shall fail to make his plea good, then this obligation to be void; else in full force and virtue.

JOEL B. ERHARDT. [L. S.]
EDWIN EINSTEIN. [L. S.]
SIRO DELMONICO. [L. S.]

Witness:
WILLIAM H. CLARKSON.

Approved October 21st, 1881.

MOSES HALLETT,
Dist. Judge.

THE UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Edwin Einstein and Siro Delmonico, sureties on the within bond, being each first duly sworn, depose and say: That they are each worth in goods, property, and money the sum below set opposite their names, respectively, that is to say, as to Edwin Einstein, more than twenty-five thousand dollars; as to Siro Delmonico, more than twenty-five thousand dollars, over and above all their just debts and liabilities, and in property subject to levy and sale upon execution.

EDWIN EINSTEIN.
116 SIRO DELMONICO.

Subscribed and sworn to before me, at the city of New York, this 13th day of October, 1881.

Witness my hand and official seal.

[L. S.] WILLIAM H. CLARKSON,
Commissioner for Colorado in New York, and Notary Public for New York County, N. Y.

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this 13th day of October, A. D. 1881, before me, William H. Clarkson, a notary public of the State of New York, in and for the county of New York, and a commissioner for Colorado in New York, duly commissioned and sworn, and dwelling in said city of New York, personally came Joel B. Erhardt, Edwin Einstein, and Siro Delmonico, to me personally known to be the same persons described in and who executed the foregoing instrument, and whose names are subscribed thereto, who signed and sealed the same in my presence, and acknowledged to me that they had executed the same as their free act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and
117 affixed my *my* official seals.

[L. S.] WILLIAM H. CLARKSON,
Notary Public for New York County, and Commissioner for Colorado in New York.

And upon the aforesaid 24th day of October, A. D. 1881, plaintiff, by his attorneys aforesaid, filed in said cause, and in said court, a citation to defendants; which said citation is hereto attached, marked A.

118 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of all proceedings had and of all papers filed in a certain cause in said court lately depending, wherein Joel B. Erhardt was plaintiff and

Anthony Boaro and others were defendants, on the chancery side thereof, except a citation, which is hereto attached, marked A.

And I herewith transmit to the honorable Supreme Court of the United States, at the city of Washington, D. C., the said transcript in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at the city of Pueblo, in said district, this 24th day of October, A. D. 1881.

[SEAL.] EDWARD F. BISHOP, *Clerk.*
By MARK G. BRADFORD, *Deputy Clerk.*

119 A.

Citation, U. S. Circuit Court.

THE UNITED STATES OF AMERICA, *District of Colorado*:

The United States of America to Anthony Boaro, W. L. Hull, Eugene B. Cushing, and August Krille, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, now sitting at Washington, on the third Monday of said term, being on the twenty-fourth (24th) day of October instant, in a certain appeal from the decree of the circuit court for the district of Colorado, wherein Joel B. Erhardt is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallet, judge of the circuit court of the United States for the district of Colorado, this 21st day of October, in the year of our Lord one thousand eight hundred and eighty-one.

MOSES HALLETT, *Judge.*

Rec'd a copy hereof this Oct. 22, A. D. 1881.
MARKHAM & PATTERSON,
Solicitors for Def'ts.

120 *Proof of Service.*

THE UNITED STATES OF AMERICA, } *ss:*
State and District of Colorado, County of Arapahoe, }

On this 22 day of October, A. D. 1881, personally appeared E. T. Wells before the undersigned, a notary public in and for the county of Arapahoe aforesaid, and makes oath that he delivered a true copy of the within citation to Vincent D. Markham, one of the firm of Markham & Patterson, the solicitors of the defendants in the within-mentioned cause, at the office of said Markham & Patterson, in Denver, this October 22, A. D. 1881. E. T. WELLS.

Sworn to and subscribed before me, this 22 day of October, A. D. 1881. Witness my hand and notary seal.

JOHN H. CLARK,
Notary Public.

[Endorsed:] Gen. No.——. Circuit court of the United States, district of Colorado. Joel B. Erhardt, plaintiff in error, *vs.* Anthony Boaro *et al.*, defendants in error. Citation. Filed in circuit court of the U. S. this 24 day of October, A. D. 1881. Edward F. Bishop, clerk. By M. G. Bradford, deputy clerk. —— ——, attorney for plaintiff in error.

Endorsed on cover: Colorado C. C. U. S. No. 159. Joel B. Earhardt, appellant, *vs.* Anthony Boaro, W. L. Hull, Eugene B. Cushing, and August Krille. Filed 14th November, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 158.

JOEL B. ERHARDT, PLAINTIFF IN ERROR,

vs.

ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING AND AUGUST KRILLE, DEFTS. IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO, APPELLEES.

BRIEF OF ELIHU ROOT FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 158.

JOEL B. ERHARDT,
Plaintiff in Error,

vs.

ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING AND AUGUST KRILLE,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF OF ELIHU ROOT FOR PLAINTIFF IN ERROR.

Statement of the Case.

This was an action of ejectment brought April 2, 1881, by the plaintiff in error against the defendants in error, in the Circuit Court of the United States, for the District of Colorado, for the recovery of the possession of certain mining premises claimed by the plaintiff as the HAWK LODE MINING CLAIM, and by the defendants as the JOHNNY BULL LODE MINING CLAIM, situated in Pioneer Mining District, in the County of Dolores, and State of Colorado.

The pleadings consisted of a complaint (pp. 1 and 2 of Transcript), an amended complaint (pp. 31, 32 and 33 of Transcript), in the usual form of complaints in ejectment for mining claims as prescribed by the Code of Colorado, and an answer containing specific denials of each and every allegation of the complaint, and alleging discovery and location by the defendants (pp. 6, 7 and 8 of Transcript).

The action was brought in said Circuit Court of the United States, sitting at Denver; was afterwards, on motion of defendants, transferred to the same Court sitting at Del Norte, in said district, and was thereafter again transferred by consent of parties to the same Court sitting at Pueblo, in said district, where the issues came on for trial at the September Special Term, 1881, before the Hon. Moses Hallett, District Judge of said district, in said Court presiding, and a jury.

Whereupon, as appears from the bill of exceptions, the plaintiff to maintain the said issues produced and gave evidence tending to show that he is a native born citizen of the United States, that on the 17th day of June, 1880, one Thomas Carroll, then also a citizen of the United States, while searching and exploring on behalf of himself and the plaintiff for valuable deposits of mineral, discovered on vacant, unoccupied mineral lands upon the public domain of the United States, in Pioneer Mining District, County of Dolores, and State of Colorado, upon the divide between Horse Gulch and the West Dolores, the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities, and contained in rock in place; that by the terms of the agreement between himself and Carroll, pursuant to which the explorations of said Carroll were at that time being prosecuted, all lodes and veins that said Carroll might discover were to be located one undivided fifth in the name of said Carroll, and four-fifths in the name of plaintiff.

The plaintiff also introduced evidence tending to show that said Carroll, on the day of his discovery, as aforesaid, of the said vein or lode, designated the same as the Hawk

Lode, and posted at the point of said discovery a plain sign or notice in writing, in words and figures as follows, to wit:

"HAWK LODE.

"We, the undersigned, claim 1,500 feet on this mineral "bearing lode vein or deposit.

"Dated June 17, 1880.

"JOEL B. ERHARDT, $\frac{4}{5}$ths.
"THOMAS CARROLL, $\frac{1}{5}$th."

That at the point of his discovery Carroll, on the 17th day of June, 1880, commenced to dig and excavate a discovery shaft, and sunk the same to the depth of about eighteen inches or two feet on the vein; that on the 30th of June, 1880, in the temporary absence of said Carroll and the plaintiff from the locality of said vein or lode, *and with knowledge of the rights and claim of plaintiff and Carroll in that behalf*, the defendant, Anthony Boaro, entered into and took actual possession of the said excavation and working so commenced by said Carroll; removed, threw away or concealed the stake upon which the notice aforesaid of said Carroll was written and posted, and at said Carroll's point of discovery of said vein or lode erected a stake and posted thereon a discovery and location notice in words as follows, to wit:

"JONNNY BULL LODE.

"We, the undersigned, claim 1,500 feet on this mineral "bearing vein or lode, running six hundred feet north-"east, and nine hundred feet southwest, and 150 feet on "each side of the same, with all its dips and spurs, "angles and variations.

"June 30th, 1880.

"ANTHONY BOARO.
"W. L. HULL."

That the said defendants Hull and Boaro entered into possession about July 21, 1880, and remained thereafter continuously in possession of the premises claimed by them

and described in their said discovery notice. That threats of violence to plaintiff and said Carroll, if they should enter upon said premises or attempt to take possession thereof, were communicated to said Carroll, as having been made by Boaro, early in August, 1880; and that, by means of such possession of the workings commenced by Carroll, and by means of such threats of violence, said Carroll was prevented from resuming work upon or completing said discovery shaft and working, and from entering into or working upon any other part of the said lode or vein, and prevented from performing the acts of location required by law, within the time limited therefor.

The plaintiff also produced and gave evidence tending to show that during all the period of sixty days next following the discovery of said vein or lode by said Carroll, he the plaintiff was himself absent from the State of Colorado; that said Carroll was authorized and instructed on behalf of plaintiff to do all work necessary or proper to the location of their claim, and that *said Carroll posted his notice aforesaid in good faith with the purpose and intention of taking up and locating a claim on the vein which he had discovered as aforesaid, and always thereafter intended so to do, and never abandoned this intention;* that on or about the 1st day of August, 1880, Carroll applied to one French, the agent of the plaintiff at the town of Rico, near to said Hawk Lode, for assistance to take possession thereof by force, which was denied to him upon the ground that legal proceedings would be instituted for that purpose; that within the period of sixty days from the date of the discovery of said vein by Carroll defendants Hull and Boaro at the point of said discovery—working commenced by Carroll, completed an open cut exposing said vein at a depth of ten feet or more below the surface and in a well defined crevice bearing gold and silver in rock in place; that within the period of ninety days from the date of the discovery of said lode by said Carroll, said French on behalf of plaintiff and Carroll, secretly and without the knowledge of defendants, caused the boundaries of the claim described in the complaint to be marked by six substantial posts so set and established as to include

the place of discovery by Carroll of said lode, and the premises described in the complaint herein, hewed and marked on the sides in toward said claim and sunk in the ground, one at each of the four corners of said claim and one at the centre of each side line thereof, and filed in the office of the Recorder of Deeds in the County of Ouray, within the limits of which, as then constituted, said premises were situated, a location certificate in the name of the said plaintiff and Carroll, of their said claim as located and staked as aforesaid, setting forth the names of said lode, to wit: Hawk Lode, the date of location, to wit: June 17, 1880, the names of said Carroll and plaintiff as the locators thereof, one-fifth in the name of Carroll and four-fifths in the name of plaintiff, the course of said lode or vein, and such a description of the said claim with reference to natural objects and permanent landmarks as would suffice to identify the same with reasonable certainty, being the same description as in the complaint contained. The plaintiff also gave evidence tending to show that at and before the institution of this suit the said defendants were in possession of said Hawk Lode, claiming the same as the said Johnny Bull Lode, located by said Bull and Boaro. (See *Transcript pp.* 17-19.)

And thereupon the defendants, to maintain the said issues upon their part, introduced evidence tending to disprove the facts in proof of which the plaintiff had offered evidence, and also tending to show that on the 30th day of June, 1880, when the defendant Anthony Boaro entered upon the ground in controversy, he found nothing on the surface to indicate a vein or lode, nor any such excavation nor stake as that claimed by the plaintiff to have been made and erected by said Carroll; that upon the whole territory claimed by defendants, and which embraces a great portion of the claim as claimed by plaintiff and Carroll, there was nothing whatever to indicate that it had ever been previously located or claimed.

Defendants also gave evidence tending to show that their discovery cut was commenced where no excavation had previously been made, *and at a point thirty five feet distant from the point described and claimed by Carroll in his testimony as the point at which he had begun to*

sink the discovery shaft of said Hawk lode and had erected his stake and posted his notice as above mentioned, and that the top of the vein was at least four feet below the surface.

And, defendants produced and gave evidence also tending to show that said *Carroll had abandoned all claim* to the premises in controversy, and that the omission of said Carroll to perform the location work upon the said Hawk lode *was due to such abandonment*, and not to any threats of defendants or any of them, nor to the alleged occupation by Hull and Boaro, or either of them, of the alleged workings or shaft commenced by said Carroll.

The defendants also *as tending to show such abandonment* gave evidence that neither plaintiff nor said Carroll, until the latter part of October or the fore part of November, 1880, nor until by their workings the said claim was shown to be valuable ever demanded possession of the said premises, or asserted any title thereto.

The defendants also gave evidence tending to show that the said Hull and Boaro commenced work upon their said claim called the Johnny Bull Lode, on or about the 21st day of July, 1880, and not before, and sunk and excavated an open cut, cutting the vein or lode at the depth of ten feet or more, and exposed therein a vein of rock in place bearing gold and silver; that no mineral nor indications of a vein or lode were found until they reached the depth of seven or eight feet, and that subsequently and within the time limited by law, they marked the bounds of their claim on said lode, called by them the Jonny Bull Lode, in all things as required by law, and recorded the same in the office of the Recorder of Deeds of said Ouray County, by a location certificate sufficiently describing the same by natural objects and permanent landmarks, and in all respects complying with the requirements of law; that plaintiff, Erhardt, was not in the State of Colorado from June 17th, 1880, to October 1880, and that Hull and Boaro, at the time of the discovery and location, as claimed by them, and thereafter were citizens of the United States. (*See Transcript, pp.* 24, 25).

And this was all the testimony produced or given by

either party upon the trial of the issues as aforesaid. (*See Transcript*, p. 25).

EXCEPTIONS.

And thereupon the plaintiff prayed the court to instruct the jury in and according to the language of eight separate and distinct prayers, which he then offered, and severally and respectively numbered as follows, to wit: "*First*," "*Second*," "*Third*," "*Fourth*," "*Fifth*," "*Sixth*," "*Seventh*," "*Eighth*."

But the Court refused to charge in the language of said prayers, or of any of them, and to such, the rulings and opinions of the Court, the plaintiff then and there duly excepted, and reserved eight several exceptions. (*See Transcript, pp.* 25, 26 and 27.)

Thereupon the Court charged the jury in writing, and set forth in the bill of exceptions.

See Transcript of Record, pp. 27–29.

And the plaintiff then and there reserved his several distinct and separate exceptions, as mentioned in the bill of exceptions, to those general and separate parts of the said charge which are severally and respectively set forth in words and figures in his said bill of exceptions.

See Transcript, pp. 29, 30.

Thereupon the jury returned a verdict in favor of the defendants, and judgment was given thereon, that the defendants go without day and recover of and from said plaintiff their costs.

Transcript, p. 30.

The plaintiff then presented his bill of exceptions, which was signed and sealed according to law, and made part of the record in said cause (Transcript, p. 30), and thereupon sued out a writ of error from this Court to said Circuit Court of the United States for the District of Colorado (Transcript, p. 34), and in obedience thereto, a duly certified transcript of the record and proceedings in said cause

was filed in this Court, November 14, 1881 (Transcript, p. 35).

Assignment of Errors.

And now before the Justices of the Supreme Court of the United States, comes the said Joel B. Erhardt, plaintiff in error, by Elihu Root, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"First.—Under the law, before a discovery of a lode "or vein and while exploring for it, the prospector has "a right to any locality he may find vacant, and which "he may choose to occupy for that purpose, that is to "say, finding a part of the public land unoccupied, he "may in that place mine for the purpose of ascertaining "whether there is a lode or vein there, and while en- "gaged in the prosecution of the work, that is, exploring "for a lode or vein, he has a right to the place which "he may occupy. The prospector having commenced to "prospect at a certain point of the public domain, and "having discovered a vein therein, has by statute sixty "days in which to sink a shaft to the depth of ten feet "or deeper if necessary, to show a well defined crevice. "Any one who may enter upon the very place where he "has dug and made a discovery before the sixty days "expire, must be treated as a trespasser, provided the "prospector had in some efficient way indicated to "the world his appropriation of the discovery-hole "for the purpose of prosecuting his work as by law re- "quired. If the jury believe from the evidence that "Thomas Carroll, on the 17th day of June, 1880, on be- "half of himself and the plaintiff in this action, entered "upon the public domain at the point where the Johnny "Bull shaft is now sunk, and then and there made an ex- "cavation uncovering a mineral vein, and therein set up "a stake in which was written his name and the name of

"the plaintiff as discoverers, the name of the lode as "Hawk Lode, and the date of the discovery as June 17th, "1880, these several acts will give Carroll and the plaintiff "the right to the possession of said discovery hole for the "statutory period of sixty days within which to sink the "shaft to a sufficient depth—ten feet or more—to show a "well defined crevice of mineral" (Transcript, p. 25).

2d. That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"SECOND.—If the jury believe from the evidence that "the several acts above mentioned were performed by "Thomas Carroll, you are instructed that Boaro and "Hull could initiate no right at the same point while oc-"cupying the point of discovery, until the expiration of "sixty days therefrom" (Transcript, pp. 25, 26).

3d. That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"THIRD.—If the jury believe from the evidence that Mr. "Carroll in exploring for a vein of mineral discovered one "at the point in controversy and set up his stake assert-"ing his claim thereto in the manner mentioned in his "testimony, that is sufficient to entitle him to the exclu-"sive possession of the very excavation at the point of dis-"covery for the full period of sixty days." (Transcript p. 26.)

4th.—That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"FIFTH.—A demand of the premises after they were in "the possession of Boaro and Hull was not necessary, un-"less the jury believe from the evidence that if such de-"mand had been made the defendants would have peace-"ably surrendered the possession thereof." (Transcript p. 26.)

5th.—That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"SIXTH.—The Court instructs the jury that the law "never requires the performance of an idle act, and that "no inference unfavorable to the plaintiff's claim can be "drawn from Carroll's failure to demand of Hull and "Boaro possession of the premises in controversy, if they "believe from the evidence that such demand if made "would have been unavailing." (Transcript p. 26.)

6th. That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"SEVENTH.—The Court instructs the jury that from and "after the date of the discovery by a citizen of the United "States, upon its vacant, unoccupied mineral lands, of the "outcrop of a vein or body of mineral bearing rock, the "discoverer is entitled to the possession of the point at "which he made his discovery, and of such reasonable "amount of adjacent ground as is necessary or incidental "to the proper prosecution of work for opening up and "exposing the vein or body of mineral bearing rock to the "depth and within the time required by law; and to such "extent he is protected by law in his possession for the "period of sixty days from the date of his discovery."
Transcript, p. 27.

7th. That the Court refused to charge the jury in language as prayed by the plaintiff in error, as follows:

"EIGHTH.—The Court instructs the jury that upon "the date of the discovery upon vacant and un-"occupied mineral lands of the United States of a "vein or body of mineral bearing rock, or the outcrop of a "vein or body of mineral bearing rock, by a citizen of the "United States or one who has declared his intention to "become such, the discoverer becomes entitled to claim "1,500 feet on such vein or body of mineral bearing rock "along the course thereof, and he is not required to des-"ignate or give notice of the course and direction of the "claim which he intends to take up and locate thereon on

" the day of his discovery, nor until filing his location cer-
" tificate." (Transcript, p. 27).

8th. That the Court in its instructions to the jury charged in language as follows:

" It is in evidence and seems to be conceded by plaintifi
" that the notice on the stake contained no specification
" or description of the territory claimed by the locators,
" as that they claimed a number of feet on each side of
" the discovery, or in any direction therefrom. In this
" respect the notice was deficient, and under it the locators
" could not claim more than the very place in which it
" was planted. Elsewhere on the same lode or vein, if it
" extended beyond the point in controversy, any other
" citizen could make a valid location; for this notice
" specifying no bounds or limits cannot be said to have
" any extent beyond what would be necessary for sinking
" a shaft." (Transcript, pp. 29–30).

9th. That the Court, in its instructions to the jury, charged in language as follows:

" But it should appear to you from the evidence that
" Boaro entered at the very place which had been taken
" by Carroll, because as Carroll's notice failed to specify
" the territory he wished to take, it could not refer to or
" embrace any other place than that in which it was
" planted " (Transcript, p. 30).

10th. That the Court, in its instructions to the jury, charged in language as follows:

" And although Carroll may have intended to do the
" necessary work, and to perfect the location within the
" time limited by statute at the time he set his stake, if
" he afterwards abandoned his intention, plaintiff cannot
" recover. It should appear to you from the evidence that
" the plaintiff and Carroll at the time the Hawk location was
" made, and continuously thereafter, held and maintained
" the purpose and intention to complete the location, and
" that they were prevented from doing so by the act of

" Boaro and Hull in taking possession of the place in con-
" troversy and excluding the plaintiff and Carroll there-
" from " (Transcript, p. 30).

11th. That the Court, in its instructions to the jury, charged them in language as follows :

" *These several questions must be found for plaintiff by*
" *a preponderance of testimony to support a verdict in*
" *his favor*" (Transcript, p. 30).

12th. That the Court, in its instructions to the jury, charged in language as follows :

"If, by the use of reasonable diligence, the plaintiff
" and Carroll could have obtained possession for the pur-
" pose of doing the necessary work, it was their duty to
" use such diligence. If, by demand on Hull and Boaro,
" they could have obtained such possession, it was their
" duty to make such demand" (Transcript, p. 30).

Wherefore, the said plaintiff in error prays that the said judgment aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

POINTS.

The propositions of law which will be relied on in argument, in support of the foregoing assignment of errors, are as follows :

First.

From and after the date of the discovery, upon vacant and unoccupied mineral lands of the United States, upon the public domain within the State of Colorado, of a vein

or body of mineral bearing rock, or the outcrop of a vein or body of mineral bearing rock, by a citizen of the United States, or by one who has declared his intention to become such, the discoverer becomes entitled to claim 1,500 feet on such vein, or lode, or body of mineral along the course thereof, and he is not required to designate or give notice of the course and direction in which he intends to take up and locate a claim thereon *on the day of his discovery, nor before the expiration of the period of time limited for erecting the boundary stakes and filing the location certificate.*

Second.

During the period of time after discovery, limited by law for performance of the series of acts necessary to complete and perfect a location, the discoverer has such an interest, right or estate in the territory he is thus entitled to locate, as will support ejectment therefor against a trespasser or intruder.

Third.

And one who during such period of time enters upon and takes possession of such premises during the temporary absence therefrom of the prior and rightful claimant, *with knowledge of his discovery and intention to locate,* is a mere trespasser, and can thereby initiate no right as against such prior discoverer.

Fourth.

Such trespasser, who thus takes and maintains wrongful possession of such premises, can have no advantage of his wrongful act. He can allege nothing against the right of the prior discoverer.

Fifth.

Under such circumstances it is not incumbent upon the prior discovery, thus wrongfully ousted by a trespasser with knowledge of his rights, to make demand upon such trespasser for peaceable possession of the premises. The prior discovery would be justified in presuming that such demand would be unavailing, particularly as against a trespasser as aforesaid who was giving out threats of violence against such discovery in case he should undertake to re-enter.

Sixth.

And upon a question of abandonment by such prior discoverer, in an action brought by him against such wrongful intruder, *no inference unfavorable to the plaintiff* can be drawn from any failure on his part so to demand possession of the premises.

Seventh.

In an attion brought by a prior discoverer as aforesaid, who has posted a notice of his intention to take up a mining claim 1,500 feet in length on the vein or lode so by

him discovered, against one who has entered upon and taken possession of the ground at the point of such discovery, *before the expiration of the period of time limited for the performance of any act of location or requirement of law*, it is incumbent upon the defendant, after proof by plaintiff of such prior discovery and posting of notice as aforesaid, to show by a *preponderance of the testimony that the plaintiff had abandoned his intention of taking up and locating a claim upon said vein or lode. In other words abandonment is in such case an affirmative defence respecting which the burden of proof is upon the party who asserts it.*

AUTHORITIES.

Authorities to be cited on argument are as follows, to wit:

In support of various propositions embraced and included in Points First, Second, Third and Fourth, as above stated:

Erhardt *v.* Boaro, 1 Colorado Law Reporter, (p. 497 opinion of Mr. Justice Miller upon granting motion for injunction pending this action).

Also opinion of Hallett, Judge, delivered on motion for non-suit upon trial of this cause in the Court below. See Transcript, pp. 20–24, and also the following cases, to wit:

Rules and customs of miners are questions of fact to be proved like all other facts on trial.

Sullivan *vs.* Hense, 2 Colo., p. 424.

Reasonable time allowed after discovery for ascertaining course of vein.

Murley *vs.* Ennis, 2 Colorado, p. 300.

Gleeson *vs.* Martin White Co. 13 Nevada, 459, *et seq.*

Golden Fleece *vs.* Cable Con. Co., 12 Nevada, p. 312.

To same effect and that mining claim defeasible if not void beyond point where vein departs from side lines.

Patterson *vs.* Hitchcock, 3 Colo., p. 532.
Walfy *vs.* Lebanon, 4 Colo., 112.

Burden of proof upon senior locator to show course of vein in action by him against one who has made a junior location within limits of his claim.

Zollars and Highland Chief *vs.* Evans (Hallets, *J.*), 1 Colorado Law Reporter, p. 217.
Van Zandt *vs.* Argentine M. Co., Hallett, *J.*
Copps U. S. Mineral Lands, 2nd Ed., p. 410.
Same case, 1 Colo. Law Reporter, p. 524.

One wrongfully entering in temporary absence of prior claimant with knowledge of his rights is a mere trespasser, &c.

Murphy *vs.* Cobb, 5 Col., 281.

Prior possession of public land without anything more sufficient in ejectment against trespasser.

Stainninger *vs.* Andrews, 4 Nevada, 59.
See also briefs of counsel in same case.
Coryea *vs.* Cain, 16 California, p. 573.
Bradshaw *vs.* Treat, 6 *id.*, p. 172.
Hawxhurst *vs.* Lander, 28 *id.*, p. 331.
English *vs.* Johnson, 17 California, 117.

Settler upon public domain has reasonable time after entry to commence performance of series of acts necessary to perfect his right. Murley vs. *Ennis, 2 Colorado, p. 300.*

Stainninger *vs.* Andrews, 4 Nevada, 59.
See also Ophir S. M. Co. *vs.* Carpenter, 4 *id.*, 534.

And during this time is entitled to protection, and can recover from a wrong-doer, who by entering prevents compliance with requirements of law, Murley vs. *Ennis, supra.*

Stainninger *vs.* Andrews, *supra.*
See also Barnes *vs.* Stark, 4 Cali., 412.

ABANDONMENT.

A party who insists upon abandonment, and relies thereon to build up a right in himself to the thing abandoned, is upon first principles bound to establish the fact upon which his asserted claim of right thus depends.

Oreamuno *vs.* Uncle Sam Gold and Silver M. Co., 1 Nevada, p. 215.

On Abandonment in general see collation of authorities in Blanchard & Weeks' Leading Cases on Mines and Minerals, pp. 208–226. Also, Copp's U. S. Mineral Lands, 2nd Ed., p. 488.

DEMAND.

Lex neminem cogit ad vana seu inutilia Co. Litt., 1276, cited by Sup. Ct. Louisiana in Abels *v.* Glover, *holding demand unnecessary when it appears that it would have been unavailing*; 15 La. Ann., p. 247, referring to 3 Rob., (La.) 358, and 18 La., 513.

Same maxim is reliance of the cases in trover, where, taking being rightful and demand necessary to render withholding tortious, yet if it appear that demand, if made, would have been unavailing, it is dispensed with.

ARGUMENT.

First.

If it is necessary for a discoverer, at the date of his discovery, to designate by notice or otherwise, the course and direction and dimensions of the claim he intends to take up and locate, it must be by virtue of some provision of law to that effect found in the act of Congress or in the statutes of Colorado, or by virtue of some rule or custom of miners in pioneer mining districts, wherein the premises in controversy were situated.

In the laws of the United States there is no such requirement.

From the bill of exceptions it appears that no proof was offered on the trial of any such rule or custom of miners, and *without such proof, neither the Court nor the jury could take cognizance of such rule or custom, if any such there were.*

Sullivan *v.* Hense, 2 Colorado, 424.

In the general laws of Colorado (1877), sections 1811 *et seq.*, will be found the statutes of that State upon the subject of mining locations.

They require the locator of a claim to file for record a certificate of location within three months from the date of discovery, and further require him, before filing his location certificate, to do and perform certain acts of location, among them the posting of a notice at the point of his discovery, and the marking of the boundaries of the claim by six substantial posts hewed or marked on the sides in towards the claim, and sunk in the ground one at each of the four corners thereof, and one at the centre of each side line. The notice thus required must state the name of the lode, the date of the discovery and the names of the locators, *but nothing more.* So that clearly it is not the office of this notice to designate the course and direction or boundaries of the claim. The boundaries are to be established by the posts which the law does not require to be erected within any special period of time save that they must be erected before filing the location certificate, which may be done, as before mentioned, at any time *within three months after the date of discovery.* Notice is given to the world by registration of the *courses and location of the claim*, the statute providing that in the location certificate the locator must describe the land embraced within his boundary stakes by natural objects and permanent landmarks, and must state as nearly as may be the course and direction of his vein.

Before filing the location certificate, and within *two* months from the date of discovery, the locator must sink a shaft to the depth of ten feet or more to a well defined crevice, or must in one of the several prescribed ways expose the vein at a depth of ten feet below the surface, or

must drive an adit at least ten feet in along the lode from the point of discovery.

Thus sixty days' time is allowed the discoverer after discovery of the outcrop for demonstrating that he has a *vein or lode in rock in place* upon which he can predicate a location. What is the remaining period of time allowed for, if not for the purpose of enabling the discoverer *to ascertain the course and direction of his vein or lode?* This is always a most difficult problem. For in most formations the indications of the course and direction of the vein found in the discovery working are far from reliable. Having by such working proved the vein or lode to be *in place*, he must prosecute farther work of exploration, in order to trace the course of the vein in its strike and extent.

In the absence of any local statute or rule, or custom of miners, limiting the period of time for the ascertainment by the discoverer of the course of his vein or lode, the Courts held that he had a reasonable time for that purpose.

See Glason *v.* Martin White Mining Company, 13 Nevada, 459–460 and 461.

And on same and kindred questions:

Golden Fleece *v.* Cable Con. Min. Co., 12 Nevada, 312.
Murley *v.* Ennis, 2 Colorado, p. 300.
Patterson *v.* Hitchcock, 3 Colorado, 532, and
Walfy *v.* Lebanon, 4 Colorado, 112.

We can find no decision of the very point here involved, that is, *in construction of the Colorado Statute*, rendered prior to the commencement of this action, for Patterson *v.* Hitchcock, *supra*, was decided before the statute in question was enacted.

On motion for temporary injunction restraining defendants from working the mine, argued before Mr. Justice Miller, at Denver, June 20, 1881, upon a bill filed by plaintiff in error herein against defendants in error to preserve the property in controversy from waste pending this action of ejectment, Mr. Justice Miller, in a written opinion, said:

* * * *"The law of the State gives sixty days "after making discovery of mineral in which to sink "a shaft ten feet in depth. The main object of the "sixty days' possession, it seems to the Court, must "be to allow time to discover the course of the lode "in order that the location may be made thereon.* "Counsel for defendants made an ingenious argument "to show that the locator *during these sixty days to "hold his right must remain in continuous actual "possession of the ground. The Court does not so "hold. If the discoverer put up a stake at the dis-"covery, giving the name of the lode, date of discovery "and notice of his intention to locate the claim, "this is equivalent to actual possession.* Otherwise "the statute serves no useful purpose. *The intention "of the statute must be that the setting up of the dis-"covery stake, with the notice thereon, as required, is "equivalent to actual possession for the sixty days "within which he may proceed to the next step, to "wit, sink the discovery shaft to the depth of ten feet, "have survey made, mark the lines and make formal "location.*

"That the plaintiffs did not sink the shaft to the "required depth of ten feet cannot prejudice their "right in this case, for the reason that the defend-"ants prevented them from so doing by taking pos-"session of their excavation. Plaintiffs could not "prosecute their work while the defendants were in "the occupancy, and this is sufficient reason for not "sinking the shaft within the time prescribed.

"The injunction will be awarded."

That it was the intention of the legislature of Colorado to allow time sufficient for the ascertainment of the course of the vein, before requiring the discover to make his election and designate the course and direction in which he intends to take up his claim, will the more conclusively appear from consideration of the hardships which would result from the denial of this right. Thus it has been decided by all the courts unanimously, 1st, That if the locator fails to make his location according to the course

of the vein upon which it is predicated he loses so much of the vein the apex of which is not embraced within the boundary lines of the claim extended downward vertically—the vein being regarded as the principal and the surface as an accessorial right. 2nd. In Patterson *vs.* Hitchcock, *supra*, and Wolfy *v.* Lebanon, *supra*, it was decided that when the vein departs from its course or strike from the side lines of the claim, it the claim is defeasible if not void beyond the point of such departure as to the surface ground, and all other veins the tops or apexes of which are within the limits of the claim beyond such point of departure. 3d. And in Zollars & Highland Chief &c., *v.* Evans, 1 Colorado Law Reporter, p. 217, and in Van Zandt *vs.* Argentine M. Co., 1 Colorado Law Reporter, p. 524, Judge Hallett has held and has since several times stoutly contended that the vein upon which the location is based must not only extend in its course throughout the ground embraced within the limits of the claim as aforesaid, but that in an action of ejectment by the senior locator against one who has made a junior conflicting location it is incumbent upon the senior locator to prove that the vein upon which his location was predicated extends and courses throughout the conflicting area in controversy.

Thus a failure on the part of the first discover to properly and accurately designate the course of his vein is fraught with such grave consequences that it would be unreasonable if not unconscionable to require him to make his election and designation the moment he discovers the outcrop of a vein, *and before he shall have had any opportunity whatever for conducting such further work of exploration as will enable him to make an accurate or approximate ascertainment*, and no Court of Justice should make any such exaction of the first discover unless thereto constrained by some clear positive enactment of Congress or of the State of Colorado or by virtue of some rule or custom of miners adopted and obtaining in Pioneer Mining Districts. As we have already seen, there is nothing in the Act of Congress, which, by intendment even, can be construed as favoring such exaction, there is likewise no clause nor provision in

the Statutes of Colorado to that effect, and there is no rule nor custom of miners upon the subject.

It is true, that in the opinion delivered by Judge Hallett, upon the motion for nonsuit, he states that there is some such custom or rule among miners. But, as matter of fact, *there was no proof thereof on the trial of the cause*, as will appear from the bill of exceptions which recites all of the evidence produced by both parties. And without such proof, neither the judge nor the jury could take cognizance of a rule or custom of miners, it being, like all other customs, a question of fact to be proved by evidence thereof (Sullivan *vs.* Hense, 2 Colorado, p. 424).

So far we have considered what the statute of Colorado requires the notice to state and what not. Now, we will call attention to the fact that the statute does not require any notice at all to be posted at the point of discovery *on the day of the discovery*, nor within any more definite or limittd period of time than that it must be posted *before filing the location certificate*, which, as we have seen, need not be done sooner than three months after discovery.

The discoverer having sixty days after discovery within which to perform his location work, *and being under no obligation to do it* at one time or another within the "sixty days" * * "there is nothing which requires "him to go about it immediately and to continue the "work until it is completed" (opinion of Hallett, p. 21 of Transcript; also opinion of Miller, *J.*, *supra*), he frequently does not commence his work for some time after discovery. Meanwhile, he is absent from the premises and perhaps from the neighborhood. As evidence to the world of his discovery and intention to locate, he posts a notice thereof. *This notice serves as his presence on the ground.* If he should make up his mind to commence work at once and "*stay with it*" until every act of location should have been performed, no notice whatever would be necessary at the outset. Suppose such a case, and that while he was there prosecuting his work, another should come along and, stating his wish to locate a claim nearby, should ask the first discoverer in what direction he intended to claim. The latter, before the expiration of the time for marking his boundaries and before he had ascertained to his entire

satisfaction the course of his vein, might very well decline to state in what direction he would claim, lest having once elected he might become thereby estopped from afterward so changing his directions as to include the vein within the limits of his claim in case subsequent exploration should show the course of the vein to be different from what it had at first appeared.

Thus if present on the ground he evidently would not be required at the outset to state his courses and directions to a second comer.

Why then should the notice, *which is simply a substitute for his presence*, contain any such statement? Enough that it gives notice of the discovery. All new comers must then at their peril enter within the circular area of 1,500 feet centering at the point of discovery.

Such an area contains but a fraction over *one hundred and sixty-two acres;* and such a privilege is claimed not for one who before discovery is prosecuting the work of exploration by sinking a shaft or otherwise, but for him only who *has already discovered and disclosed* a vein or lode or valuable deposit of mineral, and is engaged in prosecuting his work of exploration to such further extent as will suffice to show *rock in place*, and the course and direction of the vein, lode or body of mineral which he has discovered. It is conceded that prior to discovery a prospector upon the public domain is entitled to the possession of his workings only, and of so much adjacent ground as will enable him effectually and conveniently to prosecute his work.

That much on first principles he would be justly entitled to, for the work of exploring for blind lodes or hidden deposits of mineral wealth is a meritorious work, and greatly to be encouraged.

In Pioneer Mining District there have been taken up and located at least four thousand mining claims. Of these not exceeding eight or ten will pay to work. In that mining district the area of a full claim is eleven $\frac{33}{100}$ acres. Upon the public domain of the United States it is safe to say that there are at least one thousand, and probably five or ten thousand, acres of land, classified as mineral for every acre of *pay ground*. For it is only here

and there that you will find small camps and mining districts upon the vast unexplored wilderness of mountain and rock.

Wherefore, it is confidently submitted that neither Congress nor the Legislature of Colorado intended that the rights of a discoverer should be so restricted and hampered.

Second.

And it is submitted without further argument, upon the authority of Murley *v.* Ennis, 2 Colorado, p. 300; Staininger *v.* Andrews, 4 Nevada, 59; Barnes *v.* Stark, 4 California, p. 412, and opinion of Mr. Justice Miller in Erhart *vs.* Boaro, *supra*, that during the period of time after discovery limited by law for the performance of a series of acts necessary to complete and perfect a location the discoverer has such an interest, right, title and estate in the territory he is thus entitled to locate as will support ejectment thereafter against a trespasser or intruder, as stated in the *second point*.

Third.

And one who during such period of time enters upon and takes possession of the premises during the temporary absence therefrom of the prior and rightful claimant with knowledge of his discovery and intention to locate is a mere trespasser and can thereby initiate no right as against such prior discoverer.

See opinion of Hallet, Judge, in motion for nonsuit. Transcript, pp. 20–24.

Opinion of Justice Miller, *supra*, and Murphy *v* Cobbs, 5 Colorado, 281.

Fourth.

And such trespasser who thus takes and maintains wrongful possession of such premises can have no advantage of his wrongful act. He can allege nothing against the right of the first discoverer. (See opinion of Hallett, *supra*, and Murphy *v.* Cobb, *supra*.

Fifth.

Under such circumstances it is not incumbent upon the prior discoverer, thus wrongfully ousted by a trespasser with knowledge of his rights, *to make demand upon such trespasser for peaceable possession of the premises.*

The prior discoverer would be justified in presuming that such demand would be unavailing, particularly as against a trespasser as aforesaid, who was giving out threats of violence against such discoverer in case he should attempt to re-enter.

Upon these propositions, falling as they do within the domain of general jurisprudence, it will suffice to cite, without argument or comment, the following maxim and authorities:

Lex neminem cogit ad vana seu inutilia, Co. Litt. 127 b, cited by Sup. Ct. of Louisiana, in Abels *v.* Glover, 15 La. Ann., p. 247, holding demand unnecessary when it appears that it would have been unavailing. See also 3 Rob. (La.) 358 and La. p. 513, where the maxim was acted upon in respect of the necessity of making *demand*.

Same maxim and principle is the reliance of the cases in trover, holding demand unnecessary where taking was wrongful, or taking being rightful it appears that demand if made would have been unavailing.

Sixth.

From the foregoing it follows as a necessary sequence that, if demand for possession would have been a mere idle ceremony and needless, *no inference unfavorable to the discoverer should be drawn from his failure to make the demand*, upon a question of abandonment in an action brought by him against such wrongful intruder for recovery of the premises.

Before proceeding to the discussion of the seventh and last point, we will now indicate how and in what respects the foregoing rules of law were violated by the judge who presided at the trial below.

In that portion of the charge quoted and assigned for error in the *eighth assignment*, as above, the Court held the notice posted by Carroll insufficient, because it contained no "specification or description of the territory claimed by the locators." This was clearly error, if we are right in our views of the law as expressed in *Point First*. In that portion of the charge quoted and assigned for error in the *ninth assignment*, the Court held and instructed that the entry of Boaro could not be deemed wrongful unless he occupied *the very point* at which Carroll had made his excavation and posted his notice—this view of the Court having been previously indicated in his opinion on the motion for the nonsuit. Defendants on the trial subsequently offered evidence tending to show that the point at which Boaro posted his notice and entered into actual possession was not the point indicated by Carroll, as the point at which he posted his notice and commenced his working, but 35 feet distant therefrom. This instruction was also in violation of the rule expressed in *Point First*, and therefore error.

For the same reasons the Court erred in refusing the

instructions prayed by plaintiff as set forth in the 1st, 2d, 3d assignments of error.

For the reasons indicated in the 3d, 4th and 5th and 6th points the Court also erred in refusing to instruct the jury as prayed by plaintiff in the language set forth in the 4th and 5th assignments of error.

For reasons expressed in the 1st point the Court erred in refusing to instruct as prayed by plaintiff in the language set forth in the 6th and 7th assignments of error. And finally, for reasons stated in the 5th point, the Court erred in refusing the charge prayed by plaintiff as set forth in *12th assignment of error.*

Seventh.

It only remains to consider the seventh and last point and to demonstrate how the rules of law therein stated were violated. The consideration of this point was thus reserved in order that from the discussion of the previous ones the nature; character and extent of the estate, which vests in a discoverer by virtue of discovery merely, and during the period of time limited by law for performance of the series of acts of location, might the better and more clearly appear.

Abandonment by a prior occupant of mining premises is a defense which has been much considered and discussed in the courts of California and Nevada, and by a long series of decisions in these courts it has been established that, unlike the defense of forfeiture, abandonment is a defense which need not be specially pleaded, but may be proved under a general denial of the allegations of the complaint. Electing to adopt the latter method .the defendants did not in the Court below plead abandonment specially. It appears, however, from the foregoing statement of facts, verified by references to the transcript, that defendants relied upon abandonment by plaintiff and Carroll as one of several defenses, and in support of their reliance in this behalf offered testimony of witnesses on the trial

of the case. It also appears that the plaintiff in rebuttal offered testimony tending to show that from and continuously after discovery by Carroll they intended in good faith to take up and locate a mining claim upon the vein which they had thus discovered, and had never abandoned their intention so to do.

Abandonment by plaintiff of the right and estate which he had acquired in the premises by virtue of his discovery and prior occupancy, was clearly then *one of the questions in issue between the parties to the trial.* And, as such, it was by the Court submitted to the jury for their finding and decision.

Being one of the questions thus submitted, and respecting which it devolved upon the Court to instruct the jury, this duty was discharged somewhat elaborately, and in a separate written charge, designated and numbered by the Court "4" (pp. 28, 29 of Transcript).

After having enumerated and submitted each of the four questions in issue, the judge went on to instruct the jury touching the *burden of proof* upon these *four questions*, and charged them in language, as follows:

"*These several questions must be found for plaintiff "by preponderance of testimony to support a verdict in "his favor.*"

Thus manifestly the Court below imposed upon the plaintiff the *burden of maintaining by a preponderance of the testimony* the issues upon the *question of abandonment* as well as upon the other three controverted questions.

The questions submitted to the jury were as to discovery by Carroll, the posting by him of a good and sufficient notice, entry and occupancy by Boaro at precise point of discovery by Carroll, and lastly abandonment by Carroll and plaintiff of right acquired by prior discovery and occupancy. Evidently there could have been no abandonment without prior discovery, and any instructions upon the question of abandonment must of necessity assume prior discovery by Carroll, the posting by him of a good and sufficient notice and subsequent entry by Boaro and Hall. The claim of abandonment must admit, *pro hac*

vice, prior discovery and occupancy and the other matters above stated.

Assuming then that Carroll, on behalf of himself and plaintiff, had prior to the entry of Boaro and Hull made a good and sufficient discovery, and posted a good and sufficient notice at the point of discovery, and being therefore entitled to take up and locate a mining claim on the vein or lode so discovered by performance at any time within the respective periods limited by law of the several and successive acts of location and registration, and assuming still further, as we can, *pro hac vice*, that Boaro and Hull entered and occupied the premises in controversy at the point of Carroll's discovery before the expiration of the time limited by law for the performance of the first of the series of necessary acts of location, or in other words, *before any default on Carroll's part*, it is submitted and insisted that it is incumbent upon the defendants, who entered before the natural expiration of the period of time during which Carroll and plaintiff could rightfully possess and occupy the premises for the purpose of completing their location, claiming that the right and estate of plaintiff and Carroll in the premises had come to a *premature* end, and that the premises were thereby so vacated as to become subject to location by them, *to show by a preponderance of testimony how and in what manner such abrupt and premature determination of estate had been brought about*. And the burden of proof in this respect did not vest with the plaintiff. In Merley *v.* Ennis, 2 Colorado (*supra*), p. 300, the Supreme Court of Colorado held that, while holding possession after discovery for the purpose of making development required by law, *the discoverer's right to the lode is complete, is real estate, and cannot be conveyed except by deed*. Judge Miller, in his opinion hereinbefore quoted, holds that the notice posted by Carroll was equivalent to his actual possession and occupancy during the period of time limited for making necessary development. So that plaintiff by Carroll, on behalf of himself and plaintiff, was in the actual possession or entitled to the possession of the premises in controversy before Boaro entered,

unless by some act or default he had forfeited or had abandoned this right in lands.

According to our reading of the commentators from Coke to Blackstone, and Kent and Washburn and Minor, a claim of *destruction, by matter subsequent, of an estate or interest in lands, has always been regarded with stern severity and scrutiny, and never upheld save upon strictest construction* (2 Th. Co. Litt. 1, n. (A), 4, 5, 58, 59, 1 Lo. Max. Dig. 343-4. Upon the hypothesis above stated, Hull and Boaro enter before the expiration of the term of Carroll's rightful occupation and possession, assert that Carroll's term had abruptly come to an end, and, according to the Court below, this simple assertion of theirs overcomes the presumption of natural continuity of existence, and casts upon the prior and rightful claimants the burden of showing that his estate had not ceased.

The error of the Court, in this respect, was clear, and the injury to the plaintiff was substantial, relieving the defendants as it did from the burden of proof which rightfully should have been borne by them, and casting it upon the plaintiff, whose position, in respect to the defeat by abandonment of his precedent or previous estate, *was defensive merely*. We do not deem it needful to cite, in support of these views, the many cases touching strictness of proof required in respect of matters and things which operate to *defeat an estate*. It would be idle to repeat here the propositions and reasonings found in former parts of our arguments. Suffice it to cite the attention of the Court to a case in all fours holding that *a party who insists upon abandonment, and relies* thereon to build up a right in himself to the thing abandoned, is, upon first principles, bound to establish the fact upon which his asserted claim of right depends (Oreamuno *vs.* Uncle Sam Gold and Silver M. Co., 1 Nevada, p. 215), and, upon the general principles of abandonment as applied to mining claims, Blanchard & Week's Leading Cases on Mines and Minarals, pp. 207–226, and also Copp's U. S. Mineral Lands, 2d Edition, p. 488.

This error thus made manifest as assigned in the 11*th Assignment of Errors*, is fatal to the judgment of the

lower Court, *and for this reason, alone, apart from all other considerations*, the judgment should be reversed.

For there was no attempt by the judge in any subsequent or other portion of his charge to modify or correct the effect of this erroneous instruction.

Respectfully submitted,

ELIHU ROOT,
Atty. for Plaintiff in Error.

113-531

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 159.

JOEL B. ERHARDT, APPELLANT,

vs.

ANTHONY BOARO, W. L. HULL, EUGÉNE B. CUSHING AND AUGUST KRILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO, APPELLEES.

BRIEF OF ELIHU ROOT FOR APPELLANT.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 159.

JOEL B. ERHARDT,
Appellant,

vs.

ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING AND AUGUST KRILLE,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF OF ELIHU ROOT FOR APPELLANT.

Statement of Case.

This suit is ancillary to the action of ejectment, which is No. 158 on this calendar, having been brought by the plaintiff in that action against the defendants therein to preserve the property from waste pending the action at law.

See Transcript, pp. 1–7.

Upon the bill of complaint, the answer thereto and the affidavits for the complainant and defendants, and on mo-

Supreme Court of the United States.

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See Transcript, pp. 1–7.

Upon the bill of complaint, the answer thereto and the affidavits for the complainant and defendants, and on mo-

tion of the complainant, it was ordered by Mr. Justice Miller, on the 20th day of June, 1881, that a writ of injunction issue according to the prayer of the bill, and thereupon and on the same day the writ was issued accordingly.

Transcript, pp. 38–40.

Afterwards, to wit, on the 1st day of October, after trial of the action at law and the rendition of final judgment therein in favor of the defendants, this cause came on to be heard upon the motion of the defendants to dismiss the bill of complaint and to dissolve the temporary injunction theretofore granted for the reason that final judgment in favor of the defendants had been entered in the action at law, in aid of which the said bill had been filed.

And, thereupon, it was ordered, adjudged and decreed that the said bill of complaint be, and the same was thereby, dismissed; that the temporary writ of injunction be, and the same was thereby, dissolved, and that the said defendants have and recover of the complainant their costs of suit.

From this decree dismissing his bill of complaint, the complainant appealed to this court, and for ground assigns the following, viz. :

ASSIGNMENT OF ERROR.

The court erred in dismissing the bill of complaint, as of course upon the rendition of judgment in favor of the defendants in the action at law in aid of which the bill was filed, because in the record and proceedings in said action at law there was manifest error to the prejudice of the plaintiff, and the said final judgment in favor of the defendants was erroneous, and should be reversed, annulled and altogether held for nothing for the reasons which are set forth in the brief in No. 158 hereto annexed.

Respectfully submitted.

ELIHU ROOT,
Solicitor for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 158.

JOEL B. ERHARDT,
Plaintiff in Error,

vs.

ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING AND AUGUST KRILLE,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF OF ELIHU ROOT FOR PLAINTIFF IN ERROR.

Statement of the Case.

This was an action of ejectment brought April 2, 1881, by the plaintiff in error against the defendants in error, in the Circuit Court of the United States, for the District of Colorado, for the recovery of the possession of certain mining premises claimed by the plaintiff as the HAWK LODE MINING CLAIM, and by the defendants as the JOHNNY BULL LODE MINING CLAIM, situated in Pioneer Mining District, in the County of Dolores, and State of Colorado.

The pleadings consisted of a complaint (pp. 1 and 2 of Transcript), an amended complaint (pp. 31, 32 and 33 of Transcript), in the usual form of complaints in ejectment for mining claims as prescribed by the Code of Colorado, and an answer containing specific denials of each and every allegation of the complaint, and alleging discovery and location by the defendants (pp. 6, 7 and 8 of Transcript).

The action was brought in said Circuit Court of the United States, sitting at Denver; was afterwards, on motion of defendants, transferred to the same Court sitting at Del Norte, in said district, and was thereafter again transferred by consent of parties to the same Court sitting at Pueblo, in said district, where the issues came on for trial at the September Special Term, 1881, before the Hon. Moses Hallett, District Judge of said district, in said Court presiding, and a jury.

Whereupon, as appears from the bill of exceptions, the plaintiff to maintain the said issues produced and gave evidence tending to show that he is a native born citizen of the United States, that on the 17th day of June, 1880, one Thomas Carroll, then also a citizen of the United States, while searching and exploring on behalf of himself and the plaintiff for valuable deposits of mineral, discovered on vacant, unoccupied mineral lands upon the public domain of the United States, in Pioneer Mining District, County of Dolores, and State of Colorado, upon the divide between Horse Gulch and the West Dolores, the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities, and contained in rock in place; that by the terms of the agreement between himself and Carroll, pursuant to which the explorations of said Carroll were at that time being prosecuted, all lodes and veins that said Carroll might discover were to be located one undivided fifth in the name of said Carroll, and four-fifths in the name of plaintiff.

The plaintiff also introduced evidence tending to show that said Carroll, on the day of his discovery, as aforesaid, of the said vein or lode, designated the same as the Hawk

Lode, and posted at the point of said discovery a plain sign or notice in writing, in words and figures as follows, to wit:

"HAWK LODE.

"We, the undersigned, claim 1,500 feet on this mineral "bearing lode vein or deposit.

"Dated June 17, 1880.

"JOEL B. ERHARDT, $\frac{4}{5}$ths.
"THOMAS CARROLL, $\frac{1}{5}$th."

That at the point of his discovery Carroll, on the 17th day of June, 1880, commenced to dig and excavate a discovery shaft, and sunk the same to the depth of about eighteen inches or two feet on the vein; that on the 30th of June, 1880, in the temporary absence of said Carroll and the plaintiff from the locality of said vein or lode, *and with knowledge of the rights and claim of plaintiff and Carroll in that behalf*, the defendant, Anthony Boaro, entered into and took actual possession of the said excavation and working so commenced by said Carroll; removed, threw away or concealed the stake upon which the notice aforesaid of said Carroll was written and posted, and at said Carroll's point of discovery of said vein or lode erected a stake and posted thereon a discovery and location notice in words as follows, to wit:

"JONNNY BULL LODE.

"We, the undersigned, claim 1,500 feet on this mineral "bearing vein or lode, running six hundred feet north-"east, and nine hundred feet southwest, and 150 feet on "each side of the same, with all its dips and spurs, "angles and variations.

"June 30th, 1880.

"ANTHONY BOARO.
"W. L. HULL."

That the said defendants Hull and Boaro entered into possession about July 21, 1880, and remained thereafter continuously in possession of the premises claimed by them

and described in their said discovery notice. That threats of violence to plaintiff and said Carroll, if they should enter upon said premises or attempt to take possession thereof, were communicated to said Carroll, as having been made by Boaro, early in August, 1880; and that, by means of such possession of the workings commenced by Carroll, and by means of such threats of violence, said Carroll was prevented from resuming work upon or completing said discovery shaft and working, and from entering into or working upon any other part of the said lode or vein, and prevented from performing the acts of location required by law, within the time limited therefor.

The plaintiff also produced and gave evidence tending to show that during all the period of sixty days next following the discovery of said vein or lode by said Carroll, he the plaintiff was himself absent from the State of Colorado; that said Carroll was authorized and instructed on behalf of plaintiff to do all work necessary or proper to the location of their claim, and that *said Carroll posted his notice aforesaid in good faith with the purpose and intention of taking up and locating a claim on the vein which he had discovered as aforesaid, and always thereafter intended so to do, and never abandoned this intention;* that on or about the 1st day of August, 1880, Carroll applied to one French, the agent of the plaintiff at the town of Rico, near to said Hawk Lode, for assistance to take possession thereof by force, which was denied to him upon the ground that legal proceedings would be instituted for that purpose; that within the period of sixty days from the date of the discovery of said vein by Carroll defendants Hull and Boaro at the point of said discovery—working commenced by Carroll, completed an open cut exposing said vein at a depth of ten feet or more below the surface and in a well defined crevice bearing gold and silver in rock in place; that within the period of ninety days from the date of the discovery of said lode by said Carroll, said French on behalf of plaintiff and Carroll, secretly and without the knowledge of defendants, caused the boundaries of the claim described in the complaint to be marked by six substantial posts so set and established as to include

the place of discovery by Carroll of said lode, and the premises described in the complaint herein, hewed and marked on the sides in toward said claim and sunk in the ground, one at each of the four corners of said claim and one at the centre of each side line thereof, and filed in the office of the Recorder of Deeds in the County of Ouray, within the limits of which, as then constituted, said premises were situated, a location certificate in the name of the said plaintiff and Carroll, of their said claim as located and staked as aforesaid, setting forth the names of said lode, to wit: Hawk Lode, the date of location, to wit: June 17, 1880, the names of said Carroll and plaintiff as the locators thereof, one-fifth in the name of Carroll and four-fifths in the name of plaintiff, the course of said lode or vein, and such a description of the said claim with reference to natural objects and permanent landmarks as would suffice to identify the same with reasonable certainty, being the same description as in the complaint contained. The plaintiff also gave evidence tending to show that at and before the institution of this suit the said defendants were in possession of said Hawk Lode, claiming the same as the said Johnny Bull Lode, located by said Hull and Boaro. (See *Transcript pp.* 17–19.)

And thereupon the defendants, to maintain the said issues upon their part, introduced evidence tending to disprove the facts in proof of which the plaintiff had offered evidence, and also tending to show that on the 30th day of June, 1880, when the defendant Anthony Boaro entered upon the ground in controversy, he found nothing on the surface to indicate a vein or lode, nor any such excavation nor stake as that claimed by the plaintiff to have been made and erected by said Carroll; that upon the whole territory claimed by defendants, and which embraces a great portion of the claim as claimed by plaintiff and Carroll, there was nothing whatever to indicate that it had ever been previously located or claimed.

Defendants also gave evidence tending to show that their discovery cut was commenced where no excavation had previously been made, *and at a point thirty five feet distant from the point described and claimed by Carroll in his testimony as the point at which he had begun to*

sink the discovery shaft of said Hawk lode and had erected his stake and posted his notice as above mentioned, and that the top of the vein was at least four feet below the surface.

And defendants produced and gave evidence also tending to show that said *Carroll had abandoned all claim* to the premises in controversy, and that the omission of said Carroll to perform the location work upon the said Hawk lode *was due to such abandonment*, and not to any threats of defendants or any of them, nor to the alleged occupation by Hull and Boaro, or either of them, of the alleged workings or shaft commenced by said Carroll.

The defendants also *as tending to show such abandonment* gave evidence that neither plaintiff nor said Carroll, until the latter part of October or the fore part of November, 1880, nor until by their workings the said claim was shown to be valuable ever demanded possession of the said premises, or asserted any title thereto.

The defendants also gave evidence tending to show that the said Hull and Boaro commenced work upon their said claim called the Johnny Bull Lode, on or about the 21st day of July, 1880, and not before, and sunk and excavated an open cut, cutting the vein or lode at the depth of ten feet or more, and exposed therein a vein of rock in place bearing gold and silver; that no mineral nor indications of a vein or lode were found until they reached the depth of seven or eight feet, and that subsequently and within the time limited by law, they marked the bounds of their claim on said lode, called by them the Jonny Bull Lode, in all things as required by law, and recorded the same in the office of the Recorder of Deeds of said Ouray County, by a location certificate sufficiently describing the same by natural objects and permanent landmarks, and in all respects complying with the requirements of law; that plaintiff, Erhardt, was not in the State of Colorado from June 17th, 1880, to October 1880, and that Hull and Boaro, at the time of the discovery and location, as claimed by them, and thereafter were citizens of the United States. (*See Transcript, pp.* 24, 25).

And this was all the testimony produced or given by

either party upon the trial of the issues as aforesaid. (*See Transcript*, p. 25).

EXCEPTIONS.

And thereupon the plaintiff prayed the court to instruct the jury in and according to the language of eight separate and distinct prayers, which he then offered, and severally and respectively numbered as follows, to wit: "*First*," "*Second*," "*Third*," "*Fourth*," "*Fifth*," "*Sixth*," "*Seventh*," "*Eighth*."

But the Court refused to charge in the language of said prayers, or of any of them, and to such, the rulings and opinions of the Court, the plaintiff then and there duly excepted, and reserved eight several exceptions. (*See Transcript, pp.* 25, 26 and 27.)

Thereupon the Court charged the jury in writing, and set forth in the bill of exceptions.

See Transcript of Record, pp. 27–29.

And the plaintiff then and there reserved his several distinct and separate exceptions, as mentioned in the bill of exceptions, to those general and separate parts of the said charge which are severally and respectively set forth in words and figures in his said bill of exceptions.

See Transcript, pp. 29, 30.

Thereupon the jury returned a verdict in favor of the defendants, and judgment was given thereon, that the defendants go without day and recover of and from said plaintiff their costs.

Transcript, p. 30.

The plaintiff then presented his bill of exceptions, which was signed and sealed according to law, and made part of the record in said cause (Transcript, p. 30), and thereupon sued out a writ of error from this Court to said Circuit Court of the United States for the District of Colorado (Transcript, p. 34), and in obedience thereto, a duly certified transcript of the record and proceedings in said cause

was filed in this Court, November 14, 1881 (Transcript, p. 35).

Assignment of Errors.

And now before the Justices of the Supreme Court of the United States, comes the said Joel B. Erhardt, plaintiff in error, by Elihu Root, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"First.—Under the law, before a discovery of a lode "or vein and while exploring for it, the prospector has "a right to any locality he may find vacant, and which "he may choose to occupy for that purpose, that is to "say, finding a part of the public land unoccupied, he "may in that place mine for the purpose of ascertaining "whether there is a lode or vein there, and while en-"gaged in the prosecution of the work, that is, exploring "for a lode or vein, he has a right to the place which "he may occupy. The prospector having commenced to "prospect at a certain point of the public domain, and "having discovered a vein therein, has by statute sixty "days in which to sink a shaft to the depth of ten feet "or deeper if necessary, to show a well defined crevice. "Any one who may enter upon the very place where he "has dug and made a discovery before the sixty days "expire, must be treated as a trespasser, provided the "prospector had in some efficient way indicated to "the world his appropriation of the discovery-hole "for the purpose of prosecuting his work as by law re-"quired. If the jury believe from the evidence that "Thomas Carroll, on the 17th day of June, 1880, on be-"half of himself and the plaintiff in this action, entered "upon the public domain at the point where the Johnny "Bull shaft is now sunk, and then and there made an ex-"cavation uncovering a mineral vein, and therein set up "a stake in which was written his name and the name of

"the plaintiff as discoverers, the name of the lode as "Hawk Lode, and the date of the discovery as June 17th, "1880, these several acts will give Carroll and the plaintiff "the right to the possession of said discovery hole for the "statutory period of sixty days within which to sink the "shaft to a sufficient depth—ten feet or more—to show a "well defined crevice of mineral" (Transcript, p. 25).

2d. That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"SECOND.—If the jury believe from the evidence that "the several acts above mentioned were performed by "Thomas Carroll, you are instructed that Boaro and "Hull could initiate no right at the same point while oc- "cupying the point of discovery, until the expiration of "sixty days therefrom" (Transcript, pp. 25, 26).

3d. That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"THIRD.—If the jury believe from the evidence that Mr. "Carroll in exploring for a vein of mineral discovered one "at the point in controversy and set up his stake assert- "ing his claim thereto in the manner mentioned in his "testimony, that is sufficient to entitle him to the exclu- "sive possession of the very excavation at the point of dis- "covery for the full period of sixty days." (Transcript p. 26.)

4th.—That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"FIFTH.—A demand of the premises after they were in "the possession of Boaro and Hull was not necessary, un- "less the jury believe from the evidence that if such de- "mand had been made the defendants would have peace- "ably surrendered the possession thereof." (Transcript p. 26.)

5th.—That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"SIXTH.—The Court instructs the jury that the law "never requires the performance of an idle act, and that "no inference unfavorable to the plaintiff's claim can be "drawn from Carroll's failure to demand of Hull and "Boaro possession of the premises in controversy, if they "believe from the evidence that such demand if made "would have been unavailing." (Transcript p. 26.)

6th. That the Court refused to charge the jury as prayed by the plaintiff in error in language as follows:

"SEVENTH.—The Court instructs the jury that from and "after the date of the discovery by a citizen of the United "States, upon its vacant, unoccupied mineral lands, of the "outcrop of a vein or body of mineral bearing rock, the "discoverer is entitled to the possession of the point at "which he made his discovery, and of such reasonable "amount of adjacent ground as is necessary or incidental "to the proper prosecution of work for opening up and "exposing the vein or body of mineral bearing rock to the "depth and within the time required by law; and to such "extent he is protected by law in his possession for the "period of sixty days from the date of his discovery."
Transcript, p. 27.

7th. That the Court refused to charge the jury in language as prayed by the plaintiff in error, as follows:

"EIGHTH.—The Court instructs the jury that upon "the date of the discovery upon vacant and un-"occupied mineral lands of the United States of a "vein or body of mineral bearing rock, or the outcrop of a "vein or body of mineral bearing rock, by a citizen of the "United States or one who has declared his intention to "become such, the discoverer becomes entitled to claim "1,500 feet on such vein or body of mineral bearing rock "along the course thereof, and he is not required to des-"ignate or give notice of the course and direction of the "claim which he intends to take up and locate thereon on

" the day of his discovery, nor until filing his location cer-
" tificate." (Transcript, p. 27).

8th. That the Court in its instructions to the jury charged in language as follows:

" It is in evidence and seems to be conceded by plaintifi
" that the notice on the stake contained no specification
" or description of the territory claimed by the locators,
" as that they claimed a number of feet on each side of
" the discovery, or in any direction therefrom. In this
" respect the notice was deficient, and under it the locators
" could not claim more than the very place in which it
" was planted. Elsewhere on the same lode or vein, if it
" extended beyond the point in controversy, any other
" citizen could make a valid location; for this notice
" specifying no bounds or limits cannot be said to have
" any extent beyond what would be necessary for sinking
" a shaft." (Transcript, pp. 29–30).

9th. That the Court, in its instructions to the jury, charged in language as follows:

" But it should appear to you from the evidence that
" Boaro entered at the very place which had been taken
" by Carroll, because as Carroll's notice failed to specify
" the territory he wished to take, it could not refer to or
" embrace any other place than that in which it was
" planted " (Transcript, p. 30).

10th. That the Court, in its instructions to the jury, charged in language as follows:

" And although Carroll may have intended to do the
" necessary work, and to perfect the location within the
" time limited by statute at the time he set his stake, if
" he afterwards abandoned his intention, plaintiff cannot
" recover. It should appear to you from the evidence that
" the plaintiff and Carroll at the time the Hawk location was
" made, and continuously thereafter, held and maintained
" the purpose and intention to complete the location, and
" that they were prevented from doing so by the act of

" Boaro and Hull in taking possession of the place in con-
" troversy and excluding the plaintiff and Carroll there-
" from " (Transcript, p. 30).

11th. That the Court, in its instructions to the jury, charged them in language as follows :

" *These several questions must be found for plaintiff by* " *a preponderance of testimony to support a verdict in* " *his favor* " (Transcript, p. 30).

12th. That the Court, in its instructions to the jury, charged in language as follows :

"If, by the use of reasonable diligence, the plaintiff " and Carroll could have obtained possession for the pur-
" pose of doing the necessary work, it was their duty to
" use such diligence. If, by demand on Hull and Boaro,
" they could have obtained such possession, it was their
" duty to make such demand" (Transcript, p. 30).

Wherefore, the said plaintiff in error prays that the said judgment aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

POINTS.

The propositions of law which will be relied on in argument, in support of the foregoing assignment of errors, are as follows :

First.

From and after the date of the discovery, upon vacant and unoccupied mineral lands of the United States, upon the public domain within the State of Colorado, of a vein

or body of mineral bearing rock, or the outcrop of a vein or body of mineral bearing rock, by a citizen of the United States, or by one who has declared his intention to become such, the discoverer becomes entitled to claim 1,500 feet on such vein, or lode, or body of mineral along the course thereof, and he is not required to designate or give notice of the course and direction in which he intends to take up and locate a claim thereon *on the day of his discovery, nor before the expiration of the period of time limited for erecting the boundary stakes and filing the location certificate:*

Second.

During the period of time after discovery, limited by law for performance of the series of acts necessary to complete and perfect a location, the discoverer has such an interest, right or estate in the territory he is thus entitled to locate, as will support ejectment therefor against a trespasser or intruder.

Third.

And one who during such period of time enters upon and takes possession of such premises during the temporary absence therefrom of the prior and rightful claimant, *with knowledge of his discovery and intention to locate,* is a mere trespasser, and can thereby initiate no right as against such prior discoverer.

Fourth.

Such trespasser, who thus takes and maintains wrongful possession of such premises, can have no advantage of his wrongful act. He can allege nothing against the right of the prior discoverer.

Fifth.

Under such circumstances it is not incumbent upon the prior discovery, thus wrongfully ousted by a trespasser with knowledge of his rights, to make demand upon such trespasser for peaceable possession of the premises. The prior discovery would be justified in presuming that such demand would be unavailing, particularly as against a trespasser as aforesaid who was giving out threats of violence against such discovery in case he should undertake to re-enter.

Sixth.

And upon a question of abandonment by such prior discoverer, in an action brought by him against such wrongful intruder, *no inference unfavorable to the plaintiff* can be drawn from any failure on his part so to demand possession of the premises.

Seventh.

In an attion brought by a prior discoverer as aforesaid, who has posted a notice of his intention to take up a mining claim 1,500 feet in length on the vein or lode so by

him discovered, against one who has entered upon and taken possession of the ground at the point of such discovery, *before the expiration of the period of time limited for the performance of any act of location or requirement of law*, it is incumbent upon the defendant, after proof by plaintiff of such prior discovery and posting of notice as aforesaid, to show by a *preponderance of the testimony that the plaintiff had abandoned his intention of taking up and locating a claim upon said vein or lode. In other words abandonment is in such case an affirmative defence respecting which the burden of proof is upon the party who asserts it.*

AUTHORITIES.

Authorities to be cited on argument are as follows, to wit:

In support of various propositions embraced and included in Points First, Second, Third and Fourth, as above stated:

Erhardt *v.* Boaro, 1 Colorado Law Reporter, (p. 497 opinion of Mr. Justice Miller upon granting motion for injunction pending this action).

Also opinion of Hallett, Judge, delivered on motion for non-suit upon trial of this cause in the Court below. See Transcript, pp. 20–24, and also the following cases, to wit:

Rules and customs of miners are questions of fact to be proved like all other facts on trial.

Sullivan *vs.* Hense, 2 Colo., p. 424.

Reasonable time allowed after discovery for ascertaining course of vein.

Murley *vs.* Ennis, 2 Colorado, p. 300.

Gleeson *vs.* Martin White Co. 13 Nevada, 459, *et seq.*

Golden Fleece *vs.* Cable Con. Co., 12 Nevada, p. 312.

To same effect and that mining claim defeasible if not void beyond point where vein departs from side lines.

Patterson *vs.* Hitchcock, 3 Colo., p. 532.
Walfy *vs.* Lebanon, 4 Colo., 112.

Burden of proof upon senior locator to show course of vein in action by him against one who has made a junior location within limits of his claim.

Zollars and Highland Chief *vs.* Evans (Hallets, *J.*), 1 Colorado Law Reporter, p. 217.
Van Zandt *vs.* Argentine M. Co., Hallett, *J.*
Copps U. S. Mineral Lands, 2nd Ed., p. 410.
Same case, 1 Colo. Law Reporter, p. 524.

One wrongfully entering in temporary absence of prior claimant with knowledge of his rights is a mere trespasser, &c.

Murphy *vs.* Cobb, 5 Col., 281.

Prior possession of public land without anything more sufficient in ejectment against trespasser.

Stainінger *vs.* Andrews, 4 Nevada, 59.
See also briefs of counsel in same case.
Coryea *vs.* Cain, 16 California, p. 573.
Bradshaw *vs.* Treat, 6 *id.*, p. 172.
Hawxhurst *vs.* Lander, 28 *id.*, p. 331.
English *vs.* Johnson, 17 California, 117.

Settler upon public domain has reasonable time after entry to commence performance of series of acts necessary to perfect his right. Murley vs. *Ennis, 2 Colorado, p. 300.*

Stainінger *vs.* Andrews, 4 Nevada, 59.
See also Ophir S. M. Co. *vs.* Carpenter, 4 *id.*, 534.

And during this time is entitled to protection, and can recover from a wrong-doer, who by entering prevents compliance with requirements of law, Murley vs. *Ennis, supra.*

Stainінger *vs.* Andrews, *supra.*
See also Barnes *vs.* Stark, 4 Cali., 412.

ABANDONMENT.

A party who insists upon abandonment, and relies thereon to build up a right in himself to the thing abandoned, is upon first principles bound to establish the fact upon which his asserted claim of right thus depends.

Oreamuno *vs.* Uncle Sam Gold and Silver M. Co., 1 Nevada, p. 215.

On Abandonment in general see collation of authorities in Blanchard & Weeks' Leading Cases on Mines and Minerals, pp. 208–226. Also, Copp's U. S. Mineral Lands, 2nd Ed., p. 488.

DEMAND.

Lex neminem cogit ad vana seu inutilia Co. Litt., 1276, cited by Sup. Ct. Louisiana in Abels *v.* Glover, *holding demand unnecessary when it appears that it would have been unavailing*; 15 La. *Ann.*, p. 247, referring to 3 Rob., (La.) 358, and 18 La., 513.

Same maxim is reliance of the cases in trover, where, taking being rightful and demand necessary to render withholding tortious, yet if it appear that demand, if made, would have been unavailing, it is dispensed with.

ARGUMENT.

First.

If it is necessary for a discoverer, at the date of his discovery, to designate by notice or otherwise, the course and direction and dimensions of the claim he intends to take up and locate, it must be by virtue of some provision of law to that effect found in the act of Congress or in the statutes of Colorado, or by virtue of some rule or custom of miners in pioneer mining districts, wherein the premises in controversy were situated.

In the laws of the United States there is no such requirement.

From the bill of exceptions it appears that no proof was offered on the trial of any such rule or custom of miners, and *without such proof, neither the Court nor the jury could take cognizance of such rule or custom, if any such there were.*

Sullivan *v.* Hense, 2 Colorado, 424.

In the general laws of Colorado (1877), sections 1811 *et seq.*, will be found the statutes of that State upon the subject of mining locations.

They require the locator of a claim to file for record a certificate of location within three months from the date of discovery, and further require him, before filing his location certificate, to do and perform certain acts of location, among them the posting of a notice at the point of his discovery, and the marking of the boundaries of the claim by six substantial posts hewed or marked on the sides in towards the claim, and sunk in the ground one at each of the four corners thereof, and one at the centre of each side line. The notice thus required must state the name of the lode, the date of the discovery and the names of the locators, *but nothing more.* So that clearly it is not the office of this notice to designate the course and direction or boundaries of the claim. The boundaries are to be established by the posts which the law does not require to be erected within any special period of time save that they must be erected before filing the location certificate, which may be done, as before mentioned, at any time *within three months after the date of discovery.* Notice is given to the world by registration of the *courses and location of the claim*, the statute providing that in the location certificate the locator must describe the land embraced within his boundary stakes by natural objects and permanent landmarks, and must state as nearly as may be the course and direction of his vein.

Before filing the location certificate, and within *two* months from the date of discovery, the locator must sink a shaft to the depth of ten feet or more to a well defined crevice, or must in one of the several prescribed ways expose the vein at a depth of ten feet below the surface, or

must drive an adit at least ten feet in along the lode from the point of discovery.

Thus sixty days' time is allowed the discoverer after discovery of the outcrop for demonstrating that he has a *vein or lode in rock in place* upon which he can predicate a location. What is the remaining period of time allowed for, if not for the purpose of enabling the discoverer *to ascertain the course and direction of his vein or lode?* This is always a most difficult problem. For in most formations the indications of the course and direction of the vein found in the discovery working are far from reliable. Having by such working proved the vein or lode to be *in place*, he must prosecute farther work of exploration, in order to trace the course of the vein in its strike and extent.

In the absence of any local statute or rule, or custom of miners, limiting the period of time for the ascertainment by the discoverer of the course of his vein or lode, the Courts held that he had a reasonable time for that purpose.

See Glason *v.* Martin White Mining Company, 13 Nevada, 459–460 and 461.

And on same and kindred questions:

Golden Fleece *v.* Cable Con. Min. Co., 12 Nevada, 312.

Murley *v.* Ennis, 2 Colorado, p. 300.

Patterson *v.* Hitchcock, 3 Colorado, 532, and

Walfy *v.* Lebanon, 4 Colorado, 112.

We can find no decision of the very point here involved, that is, *in construction of the Colorado Statute*, rendered prior to the commencement of this action, for Patterson *v.* Hitchcock, *supra*, was decided before the statute in question was enacted.

On motion for temporary injunction restraining defendants from working the mine, argued before Mr. Justice Miller, at Denver, June 20, 1881, upon a bill filed by plaintiff in error herein against defendants in error to preserve the property in controversy from waste pending this action of ejectment, Mr. Justice Miller, in a written opinion, said:

* * * "*The law of the State gives sixty days* "*after making discovery of mineral in which to sink* "*a shaft ten feet in depth. The main object of the* "*sixty days' possession, it seems to the Court, must* "*be to allow time to discover the course of the lode* "*in order that the location may be made thereon.* "Counsel for defendants made an ingenious argument "to show that the locator *during these sixty days to* "*hold his right must remain in continuous actual* "*possession of the ground. The Court does not so* "*hold. If the discoverer put up a stake at the dis-* "*covery, giving the name of the lode, date of discovery* "*and notice of his intention to locate the claim,* "*this is equivalent to actual possession.* Otherwise "the statute serves no useful purpose. *The intention* "*of the statute must be that the setting up of the dis-* "*covery stake, with the notice thereon, as required, is* "*equivalent to actual possession for the sixty days* "*within which he may proceed to the next step, to* "*wit, sink the discovery shaft to the depth of ten feet,* "*have survey made, mark the lines and make formal* "*location.*

"*That the plaintiffs did not sink the shaft to the* "*required depth of ten feet cannot prejudice their* "*right in this case, for the reason that the defend-* "*ants prevented them from so doing by taking pos-* "*session of their excavation. Plaintiffs could not* "*prosecute their work while the defendants were in* "*the occupancy, and this is sufficient reason for not* "*sinking the shaft within the time prescribed.*

"*The injunction will be awarded.*"

That it was the intention of the legislature of Colorado to allow time sufficient for the ascertainment of the course of the vein, before requiring the discover to make his election and designate the course and direction in which he intends to take up his claim, will the more conclusively appear from consideration of the hardships which would result from the denial of this right. Thus it has been decided by all the courts unanimously, 1st, That if the locator fails to make his location according to the course

of the vein upon which it is predicated he loses so much of the vein the apex of which is not embraced within the boundary lines of the claim extended downward vertically—the vein being regarded as the principal and the surface as an accessorial right. 2nd, In Patterson *vs.* Hitchcock, *supra*, and Wolfy *v.* Lebanon, *supra*, it was decided that when the vein departs from its course or strike from the side lines of the claim, it the claim is defeasible if not void beyond the point of such departure as to the surface ground, and all other veins the tops or apexes of which are within the limits of the claim beyond such point of departure. 3d. And in Zollars & Highland Chief &c., *v.* Evans, 1 Colorado Law Reporter, p. 217, and in Van Zandt *vs.* Argentine M. Co., 1 Colorado Law Reporter, p. 524, Judge Hallett has held and has since several times stoutly contended that the vein upon which the location is based must not only extend in its course throughout the ground embraced within the limits of the claim as aforesaid, but that in an action of ejectment by the senior locator against one who has made a junior conflicting location it is incumbent upon the senior locator to prove that the vein upon which his location was predicated extends and courses throughout the conflicting area in controversy.

Thus a failure on the part of the first discover to properly and accurately designate the course of his vein is fraught with such grave consequences that it would be unreasonable if not unconscionable to require him to make his election and designation the moment he discovers the outcrop of a vein, *and before he shall have had any opportunity whatever for conducting such further work of exploration as will enable him to make an accurate or approximate ascertainment*, and no Court of Justice should make any such exaction of the first discover unless thereto constrained by some clear positive enactment of Congress or of the State of Colorado or by virtue of some rule or custom of miners adopted and obtaining in Pioneer Mining Districts. As we have already seen, there is nothing in the Act of Congress, which, by intendment even, can be construed as favoring such exaction, there is likewise no clause nor provision in

the Statutes of Colorado to that effect, and there is no rule nor custom of miners upon the subject.

It is true, that in the opinion delivered by Judge Hallett, upon the motion for nonsuit, he states that there is some such custom or rule among miners. But, as matter of fact, *there was no proof thereof on the trial of the cause*, as will appear from the bill of exceptions which recites all of the evidence produced by both parties. And without such proof, neither the judge nor the jury could take cognizance of a rule or custom of miners, it being, like all other customs, a question of fact to be proved by evidence thereof (Sullivan *vs.* Hense, 2 Colorado, p. 424).

So far we have considered what the statute of Colorado requires the notice to state and what not. Now, we will call attention to the fact that the statute does not require any notice at all to be posted at the point of discovery *on the day of the discovery*, nor within any more definite or limittd period of time than that it must be posted *before filing the location certificate*, which, as we have seen, need not be done sooner than three months after discovery.

The discoverer having sixty days after discovery within which to perform his location work, *and being under no obligation "to do it* at one time or another within the "sixty days." * * "there is nothing which requires "him to go about it immediately and to continue the "work until it is completed" (opinion of Hallett, p. 21 of Transcript; also opinion of Miller, *J.*, *supra*), he frequently does not commence his work for some time after discovery. Meanwhile, he is absent from the premises and perhaps from the neighborhood. As evidence to the world of his discovery and intention to locate, he posts a notice thereof. *This notice serves as his presence on the ground.* If he should make up his mind to commence work at once and "*stay with it*" until every act of location should have been performed, no notice whatever would be necessary at the outset. Suppose such a case, and that while he was there prosecuting his work, another should come along and, stating his wish to locate a claim nearby, should ask the first discoverer in what direction he intended to claim. The latter, before the expiration of the time for marking his boundaries and before he had ascertained to his entire

satisfaction the course of his vein, might very well decline to state in what direction he would claim, lest having once elected he might become thereby estopped from afterward so changing his directions as to include the vein within the limits of his claim in case subsequent exploration should show the course of the vein to be different from what it had at first appeared.

Thus if present on the ground he evidently would not be required at the outset to state his courses and directions to a second comer.

Why then should the notice, *which is simply a substitute for his presence*, contain any such statement? Enough that it gives notice of the discovery. All new comers must then at their peril enter within the circular area of 1,500 feet centering at the point of discovery.

Such an area contains but a fraction over *one hundred and sixty-two acres;* and such a privilege is claimed not for one who before discovery is prosecuting the work of exploration by sinking a shaft or otherwise, but for him only who *has already discovered and disclosed* a vein or lode or valuable deposit of mineral, and is engaged in prosecuting his work of exploration to such further extent as will suffice to show *rock in place*, and the course and direction of the vein, lode or body of mineral which he has discovered. It is conceded that prior to discovery a prospector upon the public domain is entitled to the possession of his workings only, and of so much adjacent ground as will enable him effectually and conveniently to prosecute his work.

That much on first principles he would be justly entitled to, for the work of exploring for blind lodes or hidden deposits of mineral wealth is a meritorious work, and greatly to be encouraged.

In Pioneer Mining District there have been taken up and located at least four thousand mining claims. Of these not exceeding eight or ten will pay to work. In that mining district the area of a full claim is eleven $\frac{33}{100}$ acres. Upon the public domain of the United States it is safe to say that there are at least one thousand, and probably five or ten thousand, acres of land, classified as mineral for every acre of *pay ground*. For it is only here

and there that you will find small camps and mining districts upon the vast unexplored wilderness of mountain and rock.

Wherefore, it is confidently submitted that neither Congress nor the Legislature of Colorado intended that the rights of a discoverer should be so restricted and hampered.

Second.

And it is submitted without further argument, upon the authority of Murley *v.* Ennis, 2 Colorado, p. 300; Staininger *v.* Andrews, 4 Nevada, 59; Barnes *v.* Stark, 4 California, p. 412, and opinion of Mr. Justice Miller in Erhart *vs.* Boaro, *supra*, that during the period of time after discovery limited by law for the performance of a series of acts necessary to complete and perfect a location the discoverer has such an interest, right, title and estate in the territory he is thus entitled to locate as will support ejectment thereafter against a trespasser or intruder, as stated in the *second point*.

Third.

And one who during such period of time enters upon and takes possession of the premises during the temporary absence therefrom of the prior and rightful claimant with knowledge of his discovery and intention to locate is a mere trespasser and can thereby initiate no right as against such prior discoverer.

See opinion of Hallet, Judge, in motion for nonsuit. Transcript, pp. 20–24.

Opinion of Justice Miller, *supra*, and Murphy *v* Cobbs, 5 Colorado, 281.

Fourth.

And such trespasser who thus takes and maintains wrongful possession of such premises can have no advantage of his wrongful act. He can allege nothing against the right of the first discoverer. (See opinion of Hallett, *supra*, and Murphy *v.* Cobb, *supra*.

Fifth.

Under such circumstances it is not incumbent upon the prior discoverer, thus wrongfully ousted by a trespasser with knowledge of his rights, *to make demand upon such trespasser for peaceable possession of the premises.*

The prior discoverer would be justified in presuming that such demand would be unavailing, particularly as against a trespasser as aforesaid, who was giving out threats of violence against such discoverer in case he should attempt to re-enter.

Upon these propositions, falling as they do within the domain of general jurisprudence, it will suffice to cite, without argument or comment, the following maxim and authorities:

Lex neminem cogit ad vana seu inutilia, Co. Litt. 127 b, cited by Sup. Ct. of Louisiana, in Abels *v.* Glover, 15 La. Ann., p. 247, holding demand unnecessary when it appears that it would have been unavailing. See also 3 Rob. (La.) 358 and La. p. 513, where the maxim was acted upon in respect of the necessity of making *demand*.

Same maxim and principle is the reliance of the cases in trover, holding demand unnecessary where taking was wrongful, or taking being rightful it appears that demand if made would have been unavailing.

Sixth.

From the foregoing it follows as a necessary sequence that, if demand for possession would have been a mere idle ceremony and needless, *no inference unfavorable to the discoverer should be drawn from his failure to make the demand*, upon a question of abandonment in an action brought by him against such wrongful intruder for recovery of the premises.

Before proceeding to the discussion of the seventh and last point, we will now indicate how and in what respects the foregoing rules of law were violated by the judge who presided at the trial below.

In that portion of the charge quoted and assigned for error in the *eighth assignment*, as above, the Court held the notice posted by Carroll insufficient, because it contained no "specification or description of the territory claimed by the locators." This was clearly error, if we are right in our views of the law as expressed in *Point First*. In that portion of the charge quoted and assigned for error in the *ninth assignment*, the Court held and instructed that the entry of Boaro could not be deemed wrongful unless he occupied *the very point* at which Carroll had made his excavation and posted his notice—this view of the Court having been previously indicated in his opinion on the motion for the nonsuit. Defendants on the trial subsequently offered evidence tending to show that the point at which Boaro posted his notice and entered into actual possession was not the point indicated by Carroll, as the point at which he posted his notice and commenced his working, but 35 feet distant therefrom. This instruction was also in violation of the rule expressed in *Point First*, and therefore error.

For the same reasons the Court erred in refusing the

instructions prayed by plaintiff as set forth in the 1st, 2d, 3d assignments of error.

For the reasons indicated in the 3d, 4th and 5th and 6th points the Court also erred in refusing to instruct the jury as prayed by plaintiff in the language set forth in the 4th and 5th assignments of error.

For reasons expressed in the 1st point the Court erred in refusing to instruct as prayed by plaintiff in the language set forth in the 6th and 7th assignments of error. And finally, for reasons stated in the 5th point, the Court erred in refusing the charge prayed by plaintiff as set forth in *12th assignment of error*.

Seventh.

It only remains to consider the seventh and last point and to demonstrate how the rules of law therein stated were violated. The consideration of this point was thus reserved in order that from the discussion of the previous ones the nature, character and extent of the estate, which vests in a discoverer by virtue of discovery merely, and during the period of time limited by law for performance of the series of acts of location, might the better and more clearly appear.

Abandonment by a prior occupant of mining premises is a defense which has been much considered and discussed in the courts of California and Nevada, and by a long series of decisions in these courts it has been established that, unlike the defense of forfeiture, abandonment is a defense which need not be specially pleaded, but may be proved under a general denial of the allegations of the complaint. Electing to adopt the latter method the defendants did not in the Court below plead abandonment specially. It appears, however, from the foregoing statement of facts, verified by references to the transcript, that defendants relied upon abandonment by plaintiff and Carroll as one of several defenses, and in support of their reliance in this behalf offered testimony of witnesses on the trial

of the case. It also appears that the plaintiff in rebuttal offered testimony tending to show that from and continuously after discovery by Carroll they intended in good faith to take up and locate a mining claim upon the vein which they had thus discovered, and had never abandoned their intention so to do.

Abandonment by plaintiff of the right and estate which he had acquired in the premises by virtue of his discovery and prior occupancy, was clearly then *one of the questions in issue between the parties to the trial.* And, as such, it was by the Court submitted to the jury for their finding and decision.

Being one of the questions thus submitted, and respecting which it devolved upon the Court to instruct the jury, this duty was discharged somewhat elaborately, and in a separate written charge, designated and numbered by the Court "4" (pp. 28, 29 of Transcript).

After having enumerated and submitted each of the four questions in issue, the judge went on to instruct the jury touching the *burden of proof* upon these *four questions,* and charged them in language, as follows:

"*These several questions must be found for plaintiff* "*by preponderance of testimony to support a verdict in* "*his favor.*"

Thus manifestly the Court below imposed upon the plaintiff the *burden of maintaining by a preponderance of the testimony* the issues upon the *question of abandonment* as well as upon the other three controverted questions.

The questions submitted to the jury were as to discovery by Carroll, the posting by him of a good and sufficient notice, entry and occupancy by Boaro at precise point of discovery by Carroll, and lastly abandonment by Carroll and plaintiff of right acquired by prior discovery and occupancy. Evidently there could have been no abandonment without prior discovery, and any instructions upon the question of abandonment must of necessity assume prior discovery by Carroll, the posting by him of a good and sufficient notice and subsequent entry by Boaro and Hall. The claim of abandonment must admit, *pro hac*

vice, prior discovery and occupancy and the other matters above stated.

Assuming then that Carroll, on behalf of himself and plaintiff, had prior to the entry of Boaro and Hull made a good and sufficient discovery, and posted a good and sufficient notice at the point of discovery, and being therefore entitled to take up and locate a mining claim on the vein or lode so discovered by performance at any time within the respective periods limited by law of the several and successive acts of location and registration, and assuming still further, as we can, *pro hac vice*, that Boaro and Hull entered and occupied the premises in controversy at the point of Carroll's discovery before the expiration of the time limited by law for the performance of the first of the series of necessary acts of location, or in other words, *before any default on Carroll's part*, it is submitted and insisted that it is incumbent upon the defendants, who entered before the natural expiration of the period of time during which Carroll and plaintiff could rightfully possess and occupy the premises for the purpose of completing their location, claiming that the right and estate of plaintiff and Carroll in the premises had come to a *premature* end, and that the premises were thereby so vacated as to become subject to location by them, *to show by a preponderance of testimony how and in what manner such abrupt and premature determination of estate had been brought about*. And the burden of proof in this respect did not vest with the plaintiff. In Merley *v.* Ennis, 2 Colorado (*supra*), p. 300, the Supreme Court of Colorado held that, while holding possession after discovery for the purpose of making development required by law, *the discoverer's right to the lode is complete, is real estate, and cannot be conveyed except by deed*. Judge Miller, in his opinion hereinbefore quoted, holds that the notice posted by Carroll was equivalent to his actual possession and occupancy during the period of time limited for making necessary development. So that plaintiff by Carroll, on behalf of himself and plaintiff, was in the actual possession or entitled to the possession of the premises in controversy before Boaro entered,

unless by some act or default he had forfeited or had abandoned this right in lands.

According to our reading of the commentators from Coke to Blackstone, and Kent and Washburn and Minor, a claim *of destruction, by matter subsequent, of an estate or interest in lands, has always been regarded with stern severity and scrutiny, and never upheld save upon strictest construction* (2 Th. Co. Litt. 1, n. (A), 4, 5, 58, 59, 1 Lo. Max. Dig. 343–4. Upon the hypothesis above stated, Hull and Boarq enter before the expiration of the term of Carroll's rightful occupation and possession, assert that Carroll's term had abruptly come to an end, and, according to the Court below, this simple assertion of theirs overcomes the presumption of natural continuity of existence, and casts upon the prior and rightful claimants the burden of showing that his estate had not ceased.

The error of the Court, in this respect, was clear, and the injury to the plaintiff was substantial, relieving the defendants as it did from the burden of proof which rightfully should have been borne by them, and casting it upon the plaintiff, whose position, in respect to the defeat by abandonment of his precedent or previous estate, *was defensive merely*. We do not deem it needful to cite, in support of these views, the many cases touching strictness of proof required in respect of matters and things which operate to *defeat an estate*. It would be idle to repeat here the propositions and reasonings found in former parts of our arguments. Suffice it to cite the attention of the Court to a case in all fours holding that *a party who insists upon abandonment, and relies* thereon to build up a right in himself to the thing abandoned, is, upon first principles, bound to establish the fact upon which his asserted claim of right depends (Oreamuno *vs.* Uncle Sam Gold and Silver M. Co., 1 Nevada, p. 215), and, upon the general principles of abandonment as applied to mining claims, Blanchard & Week's Leading Cases on Mines and Minarals, pp. 207–226, and also Copp's U. S. Mineral Lands, 2d Edition, p. 488.

This error thus made manifest as assigned in the 11*th Assignment of Errors*, is fatal to the judgment of the

lower Court, *and for this reason alone, apart from all other considerations*, the judgment should be reversed.

For there was no attempt by the judge in any subsequent or other portion of his charge to modify or correct the effect of this erroneous instruction.

Respectfully submitted,

ELIHU ROOT,
Atty. for Plaintiff in Error.

113-527

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 158.

JOEL B. EARHARDT, *Plaintiff in Error,*

vs.

ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING, AND AUGUST KRILLE.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

T. M. PATTERSON,
C. S. THOMAS,
Attorneys for Defendants in Error.

WASHINGTON.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States.

October Term, 1884.

JOEL B. EARHARDT,
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ANTHONY BOARO,
W. L. HULL,
EUGENE B. CUSHING, and
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Defendants in Error.

No. 158.

In Error to the Circuit Court of the United States for the District of Colorado.

Brief of Defendants in Error.

The statement of the case by counsel for the plaintiff in error in his brief is substantially correct, and it discloses the proposition that nearly every question involved in the case is one of fact, upon which the verdict of the jury is conclusive. The assignment of errors as to the charges requested by the plaintiff and refused by the Court becomes unimportant when it is considered that their substance was given in the instructions prepared by the Court and given to the jury of its own motion. Everthing in the first, second, third, fourth, fifth, sixth, and seventh assignments, which embody the law as it is, can be found in the first, second, third, and fourth propositions contained in those actually given by the Court, and as to the others but little need be said.

The only portions of the instructions of the Court which were objected to, and which were given, are those which embody other propositions generally not included in the instructions asked for. The first forms the subject of the eighth assignment, and is in language following:

"It is in evidence and seems to be conceded by plaintiff that "the notice on the stake contained no specification or description "of the territory claimed by the locators, as that they claimed "a number of feet on each side of the discovery or in any "direction therefrom. In this respect the notice was deficient, "and under it the locators could not claim more than the very "place in which it was planted. Elsewhere on the same lode "or vein, if it extended beyond the point in controversy, any "other citizen could make a valid location; for this notice "specifying no bounds or limits cannot be said to have any "extent beyond what would be necessary for sinking a shaft."

It will be observed that this quotation is simply a part of one general instruction, which must be taken in connection with the remainder of it in order that it may be fully understood. The Court states on page 28 of the printed Record, and in connection with that part of the charge excepted to, that it is incumbent upon plaintiff to show by a preponderance of testimony that a notice of the discovery and of the claim of the locator was put up at the point of discovery; as to which, he says, notice in any other form would probably be as effectual. But inasmuch as the plaintiff claims that the notice was posted, it is necessary to consider whether that method was adopted. Then, after calling attention to the direct conflict in the testimony of the plaintiff and the defendants as to that fact, which controversy the jury are told they must determine, the Court says:

"If you find that notice was posted as testified by Carroll "you should also find *that it was sufficient for the purpose for "which it was designed*, with this modification."

We concede the proposition that the language of the Colorado

statute does not *in terms* require that the discovery notice shall designate the direction or number of feet which the locator claims, but inasmuch as any failure so to do would enable the discoverer of the vein, previous to its actual staking upon the ground, to practically monopolize a radius of fifteen hundred feet in every direction from the point of his discovery, thus enabling him to claim the right to any other vein discovered within that radius by an outsider during that time, and thus practically segregating from the public domain more than a hundred acres where the law gives him a right to but ten and one-third, some such designation must necessarily be implied. The difficulty suggested might not occur in cases where the lode or vein out-crops at the surface, because then the statute of the United States would, in terms, define the right of the locator by limiting his claim to a certain number of feet on each side of the centre of the vein at the surface. Even then, however, the discoverer should be required to designate the extent of his claim on either side of the shaft, otherwise he might be at liberty to take in the workings of third parties within fifteen hundred feet of his discovery workings either way, which would practically shut out all possibility of location for ninety days upon three thousand feet of the ledge instead of fifteen hundred—the ultimate limit of the claim.

In this case, however, the testimony of the defendants all serves to establish the existence within the ground in controversy of what the miners term a "blind" lode; that is, a lode not coming to the surface. And the instruction complained of was given with reference to the facts and to the evidence. It was given for another purpose, and that was to cover a condition of things substantially established by the testimony, to wit, that the excavation made by the plaintiff, and from which he claims to have been ousted, made no disclosure of mineral whatever. It has frequently been held by the Courts of the mineral States and Territories that while by statute there could be no location of a mining claim until the discovery of

a lode or vein within its limits, nevertheless the prospector could not be ousted, either by law or by force, from the excavation on the public domain by means of which he was seeking to make a discovery. Such possession, however, is co-extensive with the limits of the excavation only, and the notice placed by the plaintiff upon the so-called Hawk Lode seems to have been one, or at least from the evidence the jury were justified in inferring that it was one, placed upon the claim before any discovery was made by any actual work done upon it. Inasmuch, therefore, as the plaintiff claims to hold fifteen hundred by three hundred feet of the public domain *by this notice*, thus putting it to a purpose and trying to make it perform an office never intended or contemplated by the law-maker, it certainly should be as full as the Court below required. And if we are correct in this, it disposes of the ninth assignment of error as well.

Counsel for the plaintiff in error have cited a number of cases upon the proposition that prior possession of public land, without anything more, is sufficient in ejectment against the trespasser. These cases were all determined previous to the passage by Congress of those statutes which have reference to the location of mineral land; and while prior possession may still be said to be good as against the naked trespasser, yet such possession as between common trespassers is not now subject to the same rules which were applied to persons occupying that position at that time. Since certain preliminaries are now required to be done for the purpose of constituting a basis of title, he who has done them cannot be called a trespasser unless they were done against the pre-existing right of some third person, and he who has not done them can claim no prior possession, unless their performance was prevented by the unlawful act of another.

It is true, as is insisted by counsel, that a demand is never necessary where, if made, it would be unavailing, and the Court below gave no instructions which in any degree violated that proposition. The jury were told that if by demand upon

Hull and Boaro they (the plaintiff and Carroll) could have obtained possession of the mining claim, it was their duty to make such demand; which means that if such demand would have been availing it should have been made. When we consider that the defendants' evidence tended to prove that they made no threats of any kind or description against Carroll, and did not know of his claim to the property, the instruction in the form given by the Court was far better than the one asked for by the plaintiff. Counsel for the plaintiff in error has practically based his claim to a reversal upon the seventh and last point which he makes in his argument, and by which he claims that the Court below committed an error in its instruction to the jury that they should believe by a preponderance of testimony that the plaintiff had not abandoned his claim. If such had been the instruction the argument of counsel might be pertinent; but such was not. It is, without question, a fact that the abandonment by a party of title to a claim or of a claim itself will not be presumed. But here no right had been acquired which could be the subject of an abandonment. What is claimed by the defendant is, that if the plaintiff and Carroll ever had *an intention of making a location* upon their so-called Hawk Lode, *that intention* was abandoned practically before the defendants ever went upon the ground, and we do not understand that the Court even went so far as to charge the jury *that the abandonment of such intention* was something which the defendant need not prove by a preponderance of testimony. Here, as elsewhere, counsel have selected only a portion of the instruction as the basis of their exception, instead of taking the whole. From the commencement of page 29 of the Record down to the commencement of the fifth instruction there is but one charge, and that charge refers to acts which, it is claimed, the defendants perpetrated against the possession of plaintiff and Carroll, all of which are given by the plaintiff as the reason for failing to follow up his discovery by perfecting the location. It is not pretended to be questioned that the plaintiff did not

sink a discovery shaft upon the claim, and that he did not make a location within the time and in the manner required by law. If he had done so and an abandonment had been sought to be shown, the burden would have been upon the defendant. He failed to do so, and claims that his failure was due to threats of violence on the part of the defendants. The defendants say that this is not so, but, on the contrary, if the plaintiff ever thought of making a location, the thought had died out, only to be resurrected when, by the defendants' labor and development, the claim was shown to be valuable. The Court says plaintiff's position must appear by a preponderance of evidence, and this instruction we do not think will be disturbed. Inasmuch, therefore, as the legal grounds assumed by the plaintiff in error are based upon hypotheses not warranted either by the facts in the case or by the instructions of the Court, we shall content ourselves by pointing out what we conceive to be these misapprehensions, without the citation of authorities in support of the positions taken by the Court below, and which positions we believe need no citation of authority for their support here.

Respectfully submitted.

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